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TO AMEND THE SHERMAN ACT REGARDING RETAIL COMPETITION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 865

A BILL TO AMEND THE SHERMAN ACT REGARDING RETAIL COMPETITION

JUNE 1, 1989

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S521-19

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TO AMEND THE SHERMAN ACT REGARDING RETAIL COMPETITION—S. 865

THURSDAY, JUNE 1, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum presiding.

Also present: Senators Thurmond, DeConcini, Grassley, Heflin, Specter, Simon, and Kohl.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The hearing will come to order.

This hearing is about amending the antitrust laws to make sure consumers still have the benefit of discount prices. Today, shopping at discount stores is a boon for low-income families, senior citizens, and anyone looking for a bargain. The continued existence of a thriving discount industry, however, depends upon strong and well-enforced antitrust laws.

The antitrust laws prohibit manufacturers from dictating prices to retailers. This practice, known as vertical price-fixing or resale price maintenance, is automatically unlawful, thanks to a 1911 Supreme Court decision.

The validity of this 70-year-old judicial doctrine, however, was challenged by the Reagan Justice Department, which refused to enforce the law, and by a series of court cases which significantly weakened it.

I, along with a bipartisan group of my colleagues, have sought legislation to fix the situation so that this important doctrine could not be undone by the courts.

What is at issue is quite simple and has been clearly understood by consumers all over the country. This legislation will allow discount stores to continue to sell products at competitive prices. For some of us, low prices aren't just a preference; they are an imperative.

The antitrust issues to be discussed today are important, but I don't want us to lose sight of what really matters and what is really at issue: What will millions of American consumers have to pay for the products they buy.

The legislation to be discussed today basically does three things. First, it would write into the statute the longstanding court rule that resale price maintenance is per se or automatically illegal.

Second, it would clarify the evidentiary standard for sending to a jury the question of whether there is an agreement to eliminate price competition, which has been badly muddled since the *Monsanto* decision. Third, the bill provides that an agreement between a supplier and one of his purchasers to terminate another competing purchaser because of his pricing policies is per se unlawful.

This provision would overrule the decision in *Sharp Electronics* to the extent it is contrary.

I look forward to moving this legislation quickly so that consumers who need and deserve this legislation will be protected. I am particularly pleased that two of the cosponsors of this legislation are two of the most respected members of the U.S. Senate. I am very happy to welcome them here this morning.

I also see my colleague, Senator Grassley, here. Senator Grassley, do you have an opening statement?

Senator **GRASSLEY**. Could I defer for the moment to the two people at the witness table?

Senator **METZENBAUM**. Certainly.

Senator **GRASSLEY**. Thank you.

Senator **METZENBAUM**. Senator Rudman, we are very happy to hear from you, sir.

STATEMENT OF A PANEL CONSISTING OF THE HON. WARREN B. RUDMAN, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE; AND THE HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator **RUDMAN**. Thank you, Mr. Chairman and Senator Grassley, members of the committee. I appreciate the opportunity again to testify in support of S. 865, the Consumer Protection Against Price-Fixing Act of 1989.

Passage of this bill is essential to ensure continued price competition and to protect the rights of consumers. This bill addresses retail price maintenance. It simply reestablishes the rule that manufacturers are not allowed to set resale prices for their dealers.

Study after study has shown that such price restraints result only in higher prices for consumers.

Mr. Chairman, there is simply no justification, no logical basis, for permitting manufacturers to set prices for retailers. Opponents of S. 865 suggest that manufacturers must be allowed to set prices so they can guarantee that certain levels of service accompany a product. This is an absurd argument.

Contractual provisions requiring that services be provided will always achieve that goal better than engaging in price-fixing, and requiring dealer services is now allowed by law and will still be under this bill.

Does anyone really believe that high prices serve as an effective mechanism to guarantee good service? The legal profession used this argument 20 years ago and people laughed. Price-fixing by lawyers was outlawed, and that step did not increase the supply of incompetent lawyers. This long discredited theory is no more valid when applied to consumer products.

The fact is that some retailers can provide services at a lower cost than other retailers. That such competition will lead to the best products at the least cost with the greatest benefit to society is a fundamental tenet of free-market economic theory. It is unchallenged with regard to competition between manufacturers, and it applies equally to competition at the retail level.

The hypothesis that inter-brand competition is adequate to ensure full consumer choice and economic efficiency is an academician's pipe dream with no grounding in reality. Manufacturers certainly need the ability to control certain aspects of the manner in which their products are marketed, but nothing in this bill infringes on that.

Even after this measure becomes law, a manufacturer will be able to do the following things: A, require dealers to provide training for salespeople; B, require minimum types of services of the product; C, require showroom displays and other advertising commitments; D, select those dealers with whom he chooses to do business; E, raise the prices at which he sells to dealers; and, finally, unilaterally terminate a dealer for any reason.

This bill only prevents a manufacturer from engaging in price-fixing conspiracies with dealers. This bill does not set any limitation on any other standard that a manufacturer may require of a retailer. It does, in fact, allow manufacturers great flexibility as long as they do not seek to enter into an agreement to fix prices with their dealers.

The fallacious argument has been dressed up and revised in recent years, and even been given a name—the free-rider problem. We are now told that consumers may shop at a specialty store that provides greater product expertise and service and then go down the street to buy the product at a discount store.

But as I have just pointed out, S. 865 does not set any limitation on the nonprice standards a manufacturer may require of retailers. A manufacturer can solve the alleged free-rider problem in a direct, straightforward manner.

I use the word "alleged" deliberately. The free-rider argument is a nice-sounding theory unsupported by any evidence. What evidence there is goes the other way. For example, a 1984 staff report—1984, not 1978—concluded that there was little evidence that resale price maintenance was imposed to prevent free-riding on product-specific dealer services. Indeed, the free-rider explanation was explicitly rejected in two cases studied and conducted by the FTC staff.

It is important to keep in mind that probably 99 percent of the consumer products on the market do not require sustaining services. Resale price maintenance and fair trade laws, before Congress outlawed them, were not usually used to penalize consumers in buying personal computers, complicated stereo equipment or cars. Consumers were normally penalized in purchasing toothpaste, clothing, perfume, tools, and other everyday items.

S. 865 accomplishes three basic but critical goals. First, it codifies the existing rule that retail price-fixing is a per se violation of antitrust law. That rule has existed since 1911. It is now 78 years old and it is well understood by all businesses.

Second, the bill clarifies the evidentiary standards necessary to avoid summary judgment against plaintiffs. This standard was obscured by the Supreme Court in the case of *Monsanto* v. *Spray-Rite*.

In that case, the Court held that the plaintiff had to virtually have a written agreement to fix prices to avoid summary dismissal.

The Court's holding regrettably was practically an invitation to crime. All one had to do was not write it down. The result is that meritorious cases are being dismissed without the jury being able to do their job under our legal system; that is, to determine the facts.

S. 865 solves the problem. It requires a judge to send the case to the jury if he determines, in accordance with the Federal Rules of Civil Procedure, that there is sufficient evidence, direct or circumstantial, of a contract, combination or conspiracy to set, change, or maintain prices.

In the last Congress, a similar bill was passed unanimously in the House of Representatives, and reported overwhelmingly by the Senate Judiciary Committee. Nonetheless, we have made changes in these evidentiary standards in an effort to respond to concerns raised by several of our colleagues.

For example, the definition of the causation requirement has been changed to require that the plaintiff show that a communication between the manufacturer and the claimant's competitor is "the major contributing cause" of termination or refusal to supply.

The court is also permitted to grant summary judgment against the plaintiff where it determines that the trier of fact could only find a conspiracy by making inferences that are implausible. These provisions should allay concerns of those who feared extended, frivolous litigation.

Third, S. 865 addresses a problem that arose since the Judiciary Committee acted on this issue in the 100th Congress. It reverses the Supreme Court's decision last summer in *Business Electronics* v. *Sharp Electronics*.

In that case, the Court held that unless an agreement, even if one is found, specifically mentions price levels, no per se price-fixing restraint can be found. I have the greatest respect for the U.S. Supreme Court, but that decision defies comprehension.

It says, in effect, conspire all you want, even in writing, but don't write down the price on paper. The impact on the marketplace is to legalize price-fixing and, in my view, was clearly a decision written by people who frankly don't understand the reality of the marketplace.

The facts in that case were simple. Business Electronics Corporation and Gilbert Hartwell were two Houston area retailers authorized to sell calculators manufactured by Sharp Electronics. Business Electronics was a discounter. Hartwell complained about Business Electronics 'competitive pricing and finally gave Sharp an ultimatum.

Faced with the ultimatum, Sharp terminated the discounter, Business Electronics.

The dissent in the *Sharp* case characterized the decision as follows, ". . . if, instead of speculating about irrelevant vertical nonprice restraints, we focus on the precise character of the agreement before us, we can readily identify its anti-competitive nature. Before agreements were made, there was price competition in the Houston retail market for (Sharp's) products. The stronger of the two competitors was unhappy about that competition. It wanted to have the power to set the price level in the market, and therefore it complained to (Sharp) on a number of occasions about (Business Electronics') prices. Although respondent has not ranted Hartwell an exclusive dealership . . . its agreement has protected Hartwell from price competition. Indeed, given the jury's finding and the evidence in the record, that is the sole function of the agreement. It therefore fits squarely within the category of 'naked restraints of trade with no purpose except stifling of competition.' "

The fact is, Mr. Chairman, that this decision lets retailers and manufacturers act in concert to stifle competition with impunity. The discount industry will suffer, but more importantly, consumers will suffer and so will American competitiveness. This change is necessary to protect and foster the competitive environment that has made America an economic power.

In 1975, the Department of Justice under President Nixon stated that consumers would save $1.2 billion annually by the elimination of State fair trade laws permitting manufacturers to fix the price of goods. Congress had the good sense to do just that.

In 1983, the former chairman of K-Mart, Bernard Fauber, testified before the House Government Operations committee that discounting saved the American people approximately $23 billion per year. He further testified that at K-Mart alone, consumers would pay $860 million each year if K-Mart adhered to suggested retail prices.

In June of 1988, Public Citizen released a study showing the substantial savings—as much as 52 percent—that discount shopping offered to consumers. Study after study has shown that retail price competition benefits the consumer of this country, but we do not need to rely on economic analyses. The benefits from competition are obvious to all of us in our daily roles as consumers.

This bill is about protecting the ability of all Americans to shop for the best prices. It does that by preventing manufacturers and retailers from conspiring to terminate competitors and give consumers a choice. That is not much for our constituents to ask for.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Rudman, for your very powerful statement.

Senator Gorton, we are very happy to have you with us here this morning.

STATEMENT OF THE HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Thank you, Mr. Chairman. As you well know, a major tenet of antitrust law, which, in my view, is of enormous benefit to the consumers, has recently been under attack by the Justice Department and has been undercut by decisions of the Supreme Court itself—the per se or automatic rule against vertical price-fixing.

S. 865 will codify and strengthen that rule almost 80 years after it was first announced by the Supreme Court.

In an economy in which consumers spent over $3 trillion last year, allowing vertical price-fixing would have a disastrous impact on consumers and would fuel inflation. Vertical price-fixing per se results from a supplier-retailer agreement on the resale price of a product.

The effects of vertical price-fixing are even worse when a supplier and a retailer agree to eliminate a competing retailer for the purpose of reducing that retailer's price competition.

In the 12 years that I served as Attorney General of Washington State, I was always on the look out for this anticompetitive practice and attempted to take action against it.

Simply put, the per se rule against price-fixing protects several important rights: first and foremost, the consumer's right to lower prices; next, the ability of consumers and retailers to set the prices of goods free from the interference of third parties; and, finally, the right of manufacturers to choose with whom to do business without coercion from powerful retailers.

Let me give you a little background to bring this issue into perspective. The 1911 *Dr. Miles* decision, which has survived as the basic rule governing marketplace mechanisms, says that vertical price-fixing is per se illegal.

Despite the national commitment to the per se rule by all branches of government, a Depression-era exception to the *Dr. Miles* rule allowed States to permit vertical price-fixing through so-called fair trade laws. These fair trade laws were a futile attempt to help revive the 1930's economy. Later, they proved to be inflationary.

A 1969 Department of Justice survey of the States that had fair trade laws found that consumers would save over $1.2 billion if those laws were eliminated. The study estimated fair trade laws increased the price of goods by between 18 and 27 percent.

As a result, in 1975, Congress passed the Consumer Goods Pricing Act, repealing these so-called fair trade laws. Allowing vertical price-fixing 14 years later when consumer spending has tripled and inflation is on the rise would be extremely foolhardy.

For years, there was a bipartisan consensus that vertical price-fixing was harmful. Then in 1981, the Department of Justice advanced the different and, I think, incorrect approach that began with a series of public statements by Justice Department officials who claimed that vertical price-fixing was really not a harmful practice.

In 1983, the Department of Justice filed an amicus curiae brief in *Monsanto* v. *Spray-Rite Corporation*, a private case to which Justice was not even a party, urging the U.S. Supreme Court to overturn the per se rule against price-fixing. Justice asserted that manufacturers would not price-fix to increase retail prices, and that price-fixing would stimulate service competition.

On learning of the Justice Department's amicus curiae brief in *Monsanto*, Congress in 1984 reaffirmed its belief that vertical price-fixing is illegal by passing an appropriations rider prohibiting the Department of Justice from expending public funds to alter or overrule the per se rule.

Incidentally, this cause was championed by my distinguished colleague, Senator Rudman, whom I happily supported as a cosponsor of his 1984 rider. This resolution became a standard amendment to Justice appropriations bills, with one exception in 1985 when Congress lifted the ban.

We found that Justice took that opportunity to promulgate its so-called Vertical Restraints Guidelines, which, if followed, would all but define the *Dr. Miles* rule out of existence. Congress responded in 1986 with a bipartisan resolution calling for rescission of these guidelines and continuing the 1984 appropriations restrictions.

On the judicial front, the U.S. Supreme Court did not overrule the per se rule, but it has drastically changed the application against vertical price-fixing in both its 1984 *Monsanto* decision and in the 1988 *Business Electronics* v. *Sharp Electronics*.

In *Monsanto*, the Court required a more demanding standard of proof in vertical price-fixing cases. *Monsanto* addressed the classic situation in which a terminated discounter provides evidence of a competitor's price complaint, and subsequently the manufacturer terminates the discounter.

The Court held that in order to infer a conspiracy, competitors must supply, "something more than evidence of complaints," concerning a terminated distributor's pricing.

Lower courts have cited this and other language in *Monsanto* further to burden plaintiffs in vertical price-fixing cases. Particularly, the lower courts have relied on language that requires a plaintiff to produce evidence that, "tends to exclude the possibility," that the supplier had acted independently.

Last year's committee report on S. 430, an earlier version of S. 865, notes that this language had been misapplied to justify inappropriate summary dispositions against plaintiffs.

Another nail in the per se rule's coffin came in last year's decision in *Business Electronics* v. *Sharp Electronics*. In *Sharp*, the Supreme Court said that an agreement to terminate a retailer for discount pricing is not within the per se rule unless the parties also agreed to set or maintain prices at a specific price or a general price level.

In other words, an agreement to eliminate price-cutting by terminating the source of price competition is a nonprice agreement subject to the rule of reason standard. As we all know, a rule of reason standard is a tough one for plaintiffs to meet, as it calls for extensive economic analysis of prevailing market conditions. Many retailers simply cannot financially afford to pursue this type of litigation.

S. 865 seeks to address these issues by again reiterating the traditional rule in vertical price-fixing cases. Essentially, three objectives are accomplished through this bill: first, codification of the per se rule against vertical price-fixing; second, establishment of a reasonable evidentiary standard that allows a plaintiff to get to a jury trial if a price-fixing agreement is the major contributing cause of termination; and, third, reiteration that an agreement between a manufacturer and a retailer to terminate discounters for the purpose of eliminating price competition is unlawful per se.

Critics of this legislation like to point out that the discount industry is thriving today as never before, so why is this legislation necessary. Clearly, the recent history of the per se rule which I have discussed shows a rapid erosion of the legal protections for the discount industry over the past 5 years.

For the small discounter or discounter entering a new market, the marketplace constraints are significant, and if it weren't for the traditional legal protections for price competition, we would not have as many diverse sources of retail competition today.

The primary issue raised by this bill is not whether price-fixing is procompetitive, as some have liked to argue. The question is whether manufacturers, because of pressure from full-price retailers, will dictate price and service competition or whether the competitive free market will determine price and services.

Clearly, the free market is the best mechanism to set prices and services and to benefit consumers. We want American industry to be competitive with world industry, but competitiveness cannot occur at the expense of the consumer.

The goal of our antitrust laws is to assure a competitive marketplace, which in turn benefits consumers. Price decisions should be set in such a competitive market, free from artificial restraints. Passage of this bill will foster this important goal.

I urge the committee, under its distinguished chairman, to support this bill strongly and promptly.

[The statement of Senator Gorton follows:]

TESTIMONY OF SENATOR SLADE GORTON
IN SUPPORT OF S. 865
CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989

JUNE 1, 1989

A major tenet of antitrust law, which in my view is of enormous benefit to consumers, has recently been under attack by the Justice Department and has been undercut by the Supreme Court itself -- the *per se* or automatic rule against vertical price-fixing. S. 865 will codify and strengthen that rule almost 80 years after it was first announced by the Supreme Court.

In an economy in which consumers spent over $3 Trillion last year, allowing vertical price-fixing would have a disastrous impact on consumers and would fuel inflation. Vertical price-fixing *per se* results from a supplier-retailer agreeing on the resale price of a product. The effects of vertical price-fixing are even worse when a supplier and a retailer agree to eliminate a competing retailer for the purpose of reducing that retailer's price competition. In the 12 years that I was Attorney General of Washington state, I was always on the look-out for this anti-competitive practice.

Simply put, the per se rule against price fixing protects several important rights: foremost, the consumer's right to lower prices; next, the ability of consumers and retailers to set the prices of goods free from the interference of third parties; and finally the right of manufacturers to choose with whom to do business without coercion from powerful retailers.

Let me give you a little background to bring this issue into perspective. The 1911 Dr. Miles decision, which has survived as the basic rule governing market place mechanisms, says that vertical price fixing is per se illegal. Despite the national commitment to the per se rule by all branches of government, a Depression era exception to the Dr. Miles rule allowed states to permit vertical price-fixing through so-called "fair trade" laws. These fair trade laws were a futile attempt to help revive the 1930's economy; later, they proved to be inflationary. A 1969 U.S. Department of Justice survey of the states that had fair trade laws found that consumers would save over $1.2 billion if fair trade laws were eliminated. The study estimated fair trade laws increased the price of goods by 18-27%. As a result, in 1975, Congress passed the Consumer Goods Pricing Act repealing these so-called "fair trade" laws. Allowing vertical price-fixing 14 years later, when consumer spending has tripled and inflation is on the rise, would be foolhardy.

For years there was a bipartisan consensus that vertical price-fixing was harmful. In 1981, the Department of Justice under President Reagan advanced a different, and I think, incorrect approach. It began with a series of public statements by Justice Department officials who claimed that vertical price fixing was really not a harmful practice. In 1983, the Department of Justice filed an amicus curiae (friend of the court) brief in Monsanto Co. v. Spray-Rite Corp., a private case to which Justice was not even a party, urging the United States

Supreme Court to overturn the per se rule against price-fixing. Justice asserted that manufacturers would not price-fix to increase retail prices, and that price-fixing would stimulate service competition.

Upon learning of the Justice Department's amicus curiae brief in Monsanto, Congress in 1984 reaffirmed its belief that vertical price-fixing is illegal by passing an appropriations rider prohibiting the Department of Justice from expending public funds to alter or overrule the per se rule. Incidentally, this cause was championed by my distinguished colleague, Senator Rudman, whom I gladly supported as a cosponsor of his 1984 rider. This resolution became a standard amendment to Justice appropriations bills, with one exception in 1985 when Congress lifted the ban. We found that Justice took that opportunity to promulgate its so-called "Vertical Restraints Guidelines" which if followed, would all but define the Dr. Miles rule out of existence. Congress responded in 1986 with a bipartisan resolution calling for rescission of these guidelines and continuing the 1984 appropriations restrictions.

On the judicial front, the United States Supreme Court did not overrule the per se rule, but it has drastically changed the application of the rule against vertical price-fixing in both its 1984 Monsanto decision and 1988 Business Electronics v. Sharp Electronics decision. In Monsanto the Court required a more demanding standard of proof in vertical price-fixing cases.

Monsanto addressed the classic situation in which a terminated discounter provides evidence of a competitor's price complaint, and subsequently the manufacturer terminates the discounter. The Court held that in order to infer a conspiracy, competitors must supply "something more than evidence of complaints" concerning a terminated distributor's pricing.

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S. 865 seeks to address these issues by again reiterating the traditional rule in vertical price-fixing cases. Essentially three objectives are accomplished through this bill:

- Codification of the per se rule against vertical price-fixing
- Establishment of a reasonable evidentiary standard that allows a plaintiff to get to a jury trial if a price fixing agreement is "the major contributing cause" of termination
- Reiteration that an agreement between a manufacturer and a retailer to terminate discounters for the purpose of eliminating price competition is unlawful per se.

Critics of this legislation like to point out that "the discount industry is thriving today as never before, so why is this legislation necessary?" Clearly, the recent history of the per se rule that I have discussed shows a rapid erosion of the legal protections of the discount industry over the last 5 years. For the small discounter or discounter entering a new market, the market place constraints are significant. And if it weren't for the traditional legal protections for price competition, we would not have as many diverse sources of competition today.

The primary issue raised by this bill is not whether price-fixing is pro-competitive, as some like to argue. The question is whether manufacturers, because of pressure from full price retailers, will dictate price and service competition or whether the competitive free market will determine price and service. Clearly, the free market is the best mechanism to set prices and service and to benefit consumers. We want American industry to be competitive with world industry, but competitiveness cannot occur at the expense of the consumer.

The goal of our anti-trust laws is to assure a competitive marketplace, which in turn benefits consumers. Price decisions should be set in a competitive market, free from artificial restraints. Passage of this bill will foster this important goal.

I urge the committee to support this bill.

Senator **Metzenbaum**. I am very pleased to have the support of two very distinguished members of this body, two former attorneys general. As I was looking at my schedule, I see that there is a spokesman here for the National Association of Attorneys General. I say to myself he is going to have a difficult time putting up a better statement than the two former attorneys general have made. We are very grateful to both of you.

I have no questions. I don't know if any of my colleagues do.

Senator **DeConcini**. Mr. Chairman, I have a statement at some time I would like to get in the record.

Senator **Metzenbaum**. Yes; I intend to get to that, sir.

Thank you very much, gentlemen.

Senator **Grassley**. Mr. Chairman, I have some questions I would like to ask.

Mr. **Thurmond**. Mr. Chairman, we had a few——.

Senator **Metzenbaum**. Oh, certainly. I didn't mean to cut you off, Senator Grassley, or Senator Thurmond.

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator **Thurmond**. Mr. Chairman, we are here again to listen to statements, both pro and con, concerning legislation which would codify the per se standard for resale price maintenance and overrule two Supreme Court decisions dealing with resale price maintenance.

I spoke out vigorously in the last Congress against this bill, and I intend to speak out against it in this Congress. At the outset, however, let me be clear. I am opposed to price-fixing, whether it be horizontal between competitors or vertical between a manufacturer and a retailer. Price-fixing and price-fixers have no place in a competitive marketplace.

This bill, however, is not about whether one is against price-fixing. It is about what kind of activities constitute vertical price-fixing and what standard of proof is required to establish vertical price-fixing.

In addition, unlike any other antitrust provision in effect today, this bill would codify the per se standard of illegality for vertical price-fixing—a judicially-created standard which I believe is best left to the courts to define and develop.

Mr. Chairman, contrary to what the proponents of this legislation state, I do not believe that this bill will help consumers, nor is it necessary to protect discount operations in this country.

There is nothing in this bill that mandates lower prices. In fact, because it is likely to cause an increase in litigation from manufacturers who will be forced to defend even the most frivolous suits, it will likely result in an increase in consumer prices.

There is also no evidence that discount operations have declined since the 1984 *Monsanto* decision. On the contrary, the evidence proves beyond a doubt that discount operations have experienced unprecedented growth and that consumers have benefitted in having a choice between full-service businesses and discount businesses.

In discussing this issue today, it should be remembered that the *Monsanto* decision was not reached by a majority of conservatives on the Supreme Court. With the exception of Justice White, who did not participate in the decision, *Monsanto* was decided by a unanimous Court.

The *Sharp* decision was also decided by a solid majority of six to two, with Justice Kennedy not participating.

Under the circumstances and in view of the Court's earlier decision in *GTE Sylvania*, I believe these decisions should be given great weight. I am not persuaded that factual developments before or after these decisions warrant our intervention.

Mr. Chairman, as always, I would like to join you in welcoming these distinguished witnesses here today, and we shall give due consideration to what they have to say, but I wanted to express myself on this matter.

[List of groups opposing S. 865:]

Organizations Opposing S. 865

Chamber of Commerce of the United States
National Association of Manufacturers

American Apparel Manufacturers Association
American Furniture Manufacturers Association
American Paper Institute
American Textile Manufacturers Institute, Inc.
American Ski Federation
The Beer Institute
Business Council of Alabama
Citizens for a Sound Economy
Consumer Alert
The Construction Industry Manufacturers Association
Competitive Enterprise Institute
Computer & Business Equipment Manufacturers Association
Distilled Spirits Council
Electronic Industries Association
Federation of Apparel Manufacturers
Maryland Chamber of Commerce

Mississippi Manufacturers Association

National Association of Retail Druggists

National Automobile Dealers Association

National Electrical Manufacturers Association

National Office Machine Dealers Association

Portable Power Equipment Manufacturers Association

U.S. Business & Industrial Council

A-dec, Inc.

Adolph Coors Company

Apple Computer, Inc.

ARCO

Armco, Inc.

Armstrong World Industries, Inc.

Blount, Inc.

BP America

Bristol Myers Company

Canon USA, Inc.

Canton North America, Inc.

Casio, Inc.

Caterpillar, Inc.

Chalk Line, Inc.

Chevron Chemical Company

Compaq Computer Corporation

Corning Glass Works

Denon America, Inc

DOW Chemical Company

The DuPont Company

Dresser Industries, Inc.

Dynascan Corporation

Estee Lauder

FMC Corporation

Ford Motor Company

Fort Howard Corporation

GEHL Company

General Motors Corporation

Georgia Pacific Corporation

Harley-Davidson, inc.

Heublein, Inc.

Hitachi Sales Corporation of America

H.J. Heinz Company

Household International Corporation

IBM Corporation

ICI Americas, Inc.

Interco Incorporated

(Converse/Florsheim/Broyhill/Ethan Allan/The Lane Company)

ITT Corporation

Joseph E. Seagram & Sons, Inc.

Kenwood USA, Corporation

Kimberly-Clark Corporation

Kraft, Inc.

Lennox Industries, Inc.

Lenox Inc.

Lexington Fabrics, Inc.

Londontown Corporation

Mack Trucks, Inc.

Milliken & Company

Mitsubishi Electric Sales America, Inc.

Monsanto Company

NEC Home Electronics (U.S.A.) Inc.

NEC Information Systems, Inc.

NEC America, Inc.

Nike, inc.

Nissan Motor Corporation in U.S.A.

North American Philips Corporation

Outboard Marine Corporation

Parker, Hannifin Corporation

Peavey Electronics

Pendleton Woolen Mills

Pepsico, Inc.

Pfaltzgraff Co.

The Pillsbury Company

PPG Industries, Inc.

Premark International, Inc.

Raytheon Company

Rockwell International

Rohm & Haas Company

Russell Corporation

Scott Paper Company

Sharp Electronics Corporation

Siemens Corporation

Snap-On Tools

Sony Corporation of America

Springs Industries, Inc.

TeeJays Manufacturing

Texaco Inc.

Texas Instruments Incorporated

Textron Inc.

Thomson Consumer Electronics, Inc.

The Timkin Company

Tom's Foods Inc.

The Toro Company

TRW

Union Camp Corporation

United Technologies Corporation

Vanity Fair Mills

Wang Laboratories, Inc.

WestPoint Pepperell/Cluett, Peabody & Company, Inc.

Whirlpool Corporation

Xerox Corporation

Zenith Electronics Corporation

Senator **Metzenbaum**. Thank you very much, Senator Thurmond. We appreciate your comments.

In order not to impose upon the time of Senators Rudman and Gorton, if any members of the committee have questions of them—Senator Grassley does; after that, we will take opening statements.

Senator **Grassley**. First of all, I am just going to insert my statement in the record.

Senator **Metzenbaum**. Without objection, it will be included in the record. Also, I have a statement by Senator Simpson for the record.

Senator **Grassley**. Thank you.

[The statements of Senators Grassley and Simpson follows:]

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

STATEMENT OF SENATOR CHARLES E. GRASSLEY
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
ON S. 865
JUNE 1, 1989

MR. CHAIRMAN, IF THAT GREAT AMERICAN PHILOSOPHER, YOGI BERRA, WERE HERE TODAY, HE MIGHT SAY THAT "IT FEELS LIKE DEJA VU ALL OVER AGAIN!"

LAST CONGRESS, SENATORS METZENBAUM, DECONCINI, MYSELF AND OTHERS LABORED MIGHTILY TO PRODUCE S. 430 -- THE RETAIL COMPETITION ENFORCEMENT ACT.

S. 430 HAD AN IMPORTANT, BUT MODEST PURPOSE: TO CODIFY THE 'PER SE' RULE AGAINST VERTICAL PRICE FIXING, AND TO CHANGE THE QUANTUM OF PROOF NEEDED TO BE OFFERED BY A TERMINATED DEALER PLAINTIFF TO SURVIVE A SUPPLIER DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

I WAS HAPPY TO WORK ON AND TO CO-SPONSOR THIS BILL WITH MY COLLEAGUES. I WAS ALSO PLEASED THAT S. 430 ENJOYED WIDE SUPPORT AMONG DISCOUNT RETAILERS AND CONSUMERS. THE BILL MAY HAVE BEEN ON ITS WAY TO FINAL PASSAGE.

THEN CAME THE SUPREME COURT'S DECISION IN THE SHARP CASE LAST MAY, HOLDING THAT A DECISION BY A MANUFACTURER TO TERMINATE A DISCOUNTER WILL BE JUDGED UNDER THE 'RULE OF REASON', UNLESS THERE WAS SOME EVIDENCE THAT THE MANUFACTURER AND THE SURVIVING FULL-SERVICE DEALER HAD SOME KIND OF AN UNDERSTANDING ON PRICE.

THE SUPREME COURT OPINION IN SHARP DID NOT SPECIFY WHAT EVIDENCE IS REQUIRED, BUT IT IS NOTEWORTHY THAT THE OPINION AFFIRMED A FIFTH CIRCUIT DECISION THAT FOUND IT SUFFICIENT FOR LIABILITY IF THE MANUFACTURER AND THE SURVIVING DEALER "EXPRESSLY OR IMPLIEDLY AGREE TO SET ITS PRICES AT SOME LEVEL, THOUGH NOT A SPECIFIC ONE".

THIS HARDLY MEANS THAT AN ILLEGAL RESALE-PRICE AGREEMENT CANNOT BE PROVED. IT MERELY MEANS THAT WITHOUT SOME EVIDENCE OF AN UNDERSTANDING ON RESALE PRICES, IT IS NOT APPROPRIATE FOR 'PER SE' TREATMENT.

MR. CHAIRMAN, I WOULD ALSO POINT OUT THAT SHARP DID NOT UPSET THE ESTABLISHED RULE THAT AGREEMENTS TO MAINTAIN OR STABILIZE PRICES, AS WELL AS TO "SET" THEM, WILL BE 'PER SE' ILLEGAL. THUS, TERMINATED DEALERS CAN STILL WIN R.P.M. CASES. BUT TO DO SO, THEY MUST BE DILIGENT IN THEIR SEARCH FOR

EVIDENCE OF PRICE CONCERNS. THEY MUST UNCOVER EVIDENCE THAT THE STATED NON-PRICE REASONS FOR ITS TERMINATION ARE A MERE PRETEXT.

THIS BILL WOULD, OF COURSE, CHANGE ALL THAT. IT NOT ONLY CHANGES THE EVIDENTIARY RULE LAID OUT IN *MONSANTO* -- A MOVE I SUPPORT; BUT IT ALSO OVERRULES THE *SHARP* HOLDING -- TURNING VIRTUAL EVERY DEALER TERMINATION INTO TREBLE-DAMAGE LIABILITY. I'M MUCH LESS CERTAIN ABOUT THE WISDOM OF SUCH A MOVE.

I'M OPEN TO PERSUASION ON THIS POINT, AND I LOOK FORWARD TO THE TESTIMONY. BUT FOR NOW, I CAM CONSTRAINED BY PRUDENCE TO SEE HOW THE RECENTLY ENUNCIATED *SHARP* RULE PLAYS OUT IN THE LITIGATION MARKETPLACE, BEFORE I CAN HONESTLY JOIN IN URGING ITS REPEAL.

STATEMENT OF SENATOR ALAN K. SIMPSON

Senate Judiciary Committee Hearing -- S. 865
The Consumer Protection Against
Price-Fixing Act of 1989
June 1, 1989

Thank you, Mr. Chairman, for this opportunity to make a few remarks regarding the legislation which we are reviewing today. I look forward to receiving the testimony of the witnesses and to a thorough review of the ramifications of this legislation which, I believe, would be disruptive to American business and not in the best interest of the consumer.

In 1984, the Supreme Court handed down its decision in Monsanto v. Spray-Rite Service Corp. The Court held that evidence that a manufacturer terminated a dealer following, or in response to, price complaints of other dealers is "insufficient evidence" to establish vertical price fixing in violation of the Sherman Act. This legislation would overrule this unanimous decision by the Supreme Court. I believe that Monsanto clearly articulates the appropriate evidentiary standard applicable to dealer termination cases. Some proponents of this legislation argue that the evidentiary standard of Monsanto is so difficult that a plaintiff finds it virtually impossible to establish unlawful price fixing in dealer terminations. I do not believe this argument has validity, because in the Monsanto case itself, the court found more than enough evidence to support the existence of price fixing agreements.

S. 865, would also codify the "per se" rule with respect to vertical price restraints. This rule of law has been in effect since

1911 and has worked well, giving courts flexibility in its application in order to account for the growth of business relations and the body of law which controls it. I find no justification for codification of the *per se* rule which would eliminate the ability of the court to reconsider the doctrine as it may deem appropriate.

Proponents of the legislation say that if it is not enacted that discount stores will be driven out of business. This has simply not been shown to be the case. Discount stores have been thriving since the 1984 *Monsanto* decision and the more recent *Business Electronics Corp. v. Sharp Electronics Corp.*, decided by the Supreme Court in May of 1988.

This legislation would reverse the Supreme Court decision in *Sharp* as well as the *Monsanto* decision. In the *Sharp* case, the court noted that although vertical agreements on resale prices are illegal, "*per se*," extension of that treatment to other vertical restraints must be based on demonstrable economic effect rather than upon formalistic line drawing. I believe that is sound law and it does not need to be reversed by legislation.

Mr. Chairman, I too, deeply believe in promoting retail competition and in lower prices. I do not feel, however, that this legislation would achieve those ends. Competition insures that consumers receive quality goods and services at the lowest possible prices. I believe the rule of law controlling these business relationships as established by the Sherman Act and "court made" law is working well. As I said, I look forward to receiving the testimony on both sides of the issue so that we can have a full and fair hearing on this very important matter. I thank you for this opportunity to make these brief remarks.

Senator **Grassley**. In the last Congress, my colleagues, we struggled with the term "major contributing cause," and, of course, it is still here in this version of the bill. Do you think that the phrase "the major contributing cause," as opposed to "a major contributing cause," as we had in the last Congress, means the same as "the major cause?" I would hope you would agree that——.

Senator **Rudman**. You know, I really think that sometimes we start getting in a definitional precision mode which I am not sure really makes a great deal of difference.

The basic thrust of what we are trying to do probably gets served by either one of those.

Senator **Grassley**. OK.

Senator **Gorton**. In my view, Senator Grassley, the phrase "the major contributing cause" probably sets a higher standard of proof than if you use the article "a" major contributing cause.

Senator **Grassley**. OK. Well, then, that would mean that the reason for dealer termination was at least 50 percent caused by price demand?

Senator **Gorton**. No, because there could be more than two causes.

Senator **Rudman**. There could be several causes, but it doesn't set a percentage, Senator Grassley. It simply uses the word "major," and I guess major depends on which judge is hearing it. The largest of all the causes, it could be, I expect.

Senator **Grassley**. But it would have to be the major cause of all other causes?

Senator **Rudman**. That is correct.

Senator **Grassley**. So if you have got two, obviously, that would be more than 50 percent of the cause?

Senator **Rudman**. If you had two, under that scenario that would be true. If you had several, then it might be less than half.

Senator **Grassley**. Is this the same thing as saying that there would not have been a dealer termination but for the fact that this price demand or coercion was caused by the manufacturer?

Senator **Gorton**. I think that is true in many circumstances, but not necessarily in all.

Senator **Rudman**. I would say that that is essentially the intent of this legislation. I can, in all candor, see circumstances in which there might be an exception to that, but that would be unusual. The thrust of this—and I think the courts would understand if this legislation were passed and signed into law that what we meant is what the Senator stated.

But there could be a situation in which that was not so. I can't really think of one precisely, but I would have to assume you could have a fact situation that could lead to that. But I don't think that that would be reached easily.

Senator **Grassley**. Well, if you agree with that, would you object to any change in the language of the bill that made that very clear?

Senator **Rudman**. I would say, Senator Grassley, that so long as we can draft language that does not impose what most lawyers would agree today is a virtually impossible burden to prove under these cases we have been talking about, I certainly—and I am sure

Senator Metzenbaum and others would be willing, in order to build consensus, to do that. We have tried to do that.

We have changed this draft from where it was in the 100th Congress to reach that objective. I am not sure how much beyond that you go without getting to a point where you start imposing imponderable burdens.

Now, Senator Thurmond and I obviously have a strong disagreement, and I am sure that Senator Thurmond and I will have a chance to explore that in detail on the floor of the Senate, hopefully in the not too distant future.

But I do not think for a moment that this bill sets a standard that is unfair to defendants. It essentially rectifies a situation in which the pendulum has swung too far in terms of the burdens of proof, and anyone who has tried cases in Federal court understands that when you put these kinds of burdens which the Court has set forth on people, you essentially have taken away their rights because you can't meet that burden, and I have been in that situation.

Senator **GORTON**. The only caution that I would leave with you, Senator Grassley, is in dealing with antitrust statutes I think it is best not to try to be too precise. None of us can possibly foresee the millions of different kinds of individual incidents or ways in which transactions can take place.

If we look back to what I think is the wisdom of our predecessors in drafting the Sherman Act, the Clayton Act, and the like, we see that those statutes are phrased in highly generalized language so that courts can react to particular situations as those changes come up.

When the Sherman Act was passed, I don't believe we had discount houses. We didn't do retailing in the way that we do today. All of the units were much smaller than they are now.

One of the reasons we have this bill before us is that, with all due respect to Senator Thurmond, you know, we think that the Supreme Court, which has had pretty broad jurisdiction in this field, has gotten off the track in the past couple of years; that it doesn't understand the nature of retailing and price competition, I think, as well as many of us do, nor should it.

Yet, I think what we want to do is to give it fairly general guidelines and not try to anticipate every single case that will come up.

Senator **METZENBAUM**. I would say to my colleague, you have been a supporter of this bill and then a little bit off it at one point, but we are prepared to work with you with respect to language. We want your support in connection with this legislation.

I don't think we can draft the legislation here at this hearing this morning. As the principal author, I would say to you that I have worked with you before on legislation. We have always gotten along well, and I would hope we could do the same in connection with this bill.

Senator **GRASSLEY**. I have just got one other specific point that I want to make and, in a sense, ask them about. I don't disagree with what Senator Gorton said, and that is why we very carefully worked over a period of 4 or 5 months 2 years ago to redraft S. 430, and we had it all going pretty good in the right direction until *Sharp* was brought into it.

So, you know, in agreeing with your proposition to move slowly and that the test of time has done well for the writers of the original legislation, I guess that is why I am very cautious as we approach this legislation.

I want to point to the word "contributing" once again because I am a little concerned that this word might be construed to mean a lesser cause other than the major cause. So my question is why we can't simply drop this additional word "contributing" from the bill, you know, since we generally agree to this point, so far as I have interpreted what you have said and what I have asked.

Senator **Rudman**. I understand the Senator's point. I expect you are concerned about a hypothetical situation in which there were 40 causes and 39 are a two-percent factor and the other one is the balance, whatever that comes out to be. It wouldn't be very much.

I think that is your point, and maybe the word "contributing" doesn't contribute to this legislation. Maybe the sponsor ought to look at that very carefully and we ought to go back and look at *Sharp* and *Monsanto*. The Senator may raise a very valid point.

We might even get the conversion of Senator Thurmond if we could maybe get the word "contributing" out. We are going to certainly try.

Senator **Thurmond**. You are a good persuader, but you are on the wrong side of this bill. [Laughter.]

Senator **Grassley**. Mr. Chairman, I am done with my questions.

Senator **Metzenbaum**. Thank you very much, Senator Grassley.

Senator DeConcini, I know you had an opening statement.

Senator **DeConcini**. Mr. Chairman, thank you, and if our colleagues want to leave, I will be glad to send them a copy of this statement. [Laughter.]

Senator **Rudman**. We will appreciate receiving that.

Thank you, Mr. Chairman, Senator Thurmond.

Senator **Metzenbaum**. Thank you very much, gentlemen. We appreciate it.

Senator **DeConcini**. Mr. Chairman, thank you. Last Congress, the committee approved a resale price maintenance bill that was the result of a lot of hard work and good-faith negotiations, and the Senator from Ohio really led us down that road of success.

The bill, then known as S. 430, consisted of two narrowly-drawn provisions that addressed a specific and identifiable problem and did not attempt to rewrite antitrust laws.

One provision codified the longstanding rule that vertical price-fixing is per se illegal, and the other provision clarified the evidentiary standard to be used in determining whether a terminated distributor had presented sufficient evidence for the case to go to the jury.

S. 430 did not contain language that would substantially change the definition of vertical price-fixing, nor did S. 430 attempt to anticipate and overturn the Supreme Court's decision in the *Sharp* case, a decision which came down, as we know, after this committee had already approved S. 430.

Mr. Chairman, you, along with Senator Grassley, Senator Leahy and myself, cosponsored that carefully structured compromise which had the support of consumers, discount retailers, and a significant number of manufacturers. I believe had that narrowly-drawn compromise been expeditiously presented to the U.S. Senate, this hearing today would not be necessary and we would have taken effective action to protect consumers and discounters by the enactment of S. 430.

I supported S. 430, as amended by the Judiciary Committee last year, because I believe that consumers are entitled to a viable and competitive system of discount retail stores. I believed that the bill we reported last year would help to ensure that such a system would survive. I would still support a narrowly-drawn bill to allow discounters to attempt to try to prove in court that they were terminated by manufacturers because of an agreement between a manufacturer and a competitor to violate the antitrust laws.

Instead, we are about to hear testimony, and have heard distinguished colleagues here testify on a bill, S. 865, which, without question, overrules the *Sharp* decision and provides that an agreement to terminate a dealer because of his, quote, "pricing policies," is illegal per se, regardless of whether any specific retail price or price level is agreed upon.

The language of S. 865 is so broad as to create the potential of putting an entirely innocent manufacturer at the risk of treble damage liability any time it changes its distribution system. I am at a loss to see how this major change in the antitrust laws will stimulate the discount retail industry or benefit consumers, for that matter. In my opinion, this bill would be likely to inhibit a manufacturer's ability to choose to use discount stores in its distribution system.

So, Mr. Chairman, I look forward to working with you in the spirit that you and I have always worked on issues that we have disagreed on to see if we can put together a compromise bill, as we did last year. I am more than happy to do that.

I would like to, Mr. Chairman, at this time welcome Mr. Alan P. Hald, Chairman of MicroAge Computer Stores from Tempe, Arizona, who will be one of your witnesses later this morning. I have to leave shortly and I will not be here to personally welcome him.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator DeConcini.

Senator Kohl, do you have an opening statement?

Senator KOHL. Thank you. Mr. Chairman, thank you very much. Few in Congress have worked as diligently and effectively as you have on behalf of consumer interests. Price competition is a fundamental principle of our retail economy. All of us are its beneficiaries.

For American business, it has spurred innovation, technological development, corporate growth, and financial profit. And for American consumers, it has created a myriad of shopping options. From full-service establishments to department stores to discounters, Americans can find a wider selection of goods at lower prices than anywhere else in the world.

When I was in business, I saw this competition from both sides. As a retailer, I sometimes undersold my competitors, but sometimes they undersold me. I appreciated this competition then and I appreciate it now.

I believe that the antitrust laws have served producers and consumers by promoting robust price competition. However, while I am not convinced that the discount industry's sky will fall down if we don't change current law, I am concerned that recent developments may undermine this competitive environment.

First, the executive branch has been far too reluctantly enforcing our antitrust laws. For more than 75 years, resale price maintenance has been per se illegal for a simple reason. When a manufacturer conspires to require its distributors to charge a fixed price for a good or service, it eliminates price competition for consumers.

Yet, despite this widely held view, the Justice Department has virtually abandoned public enforcement of the RPM prohibition. It has not brought a single vertical price-fixing case in the past 8 years.

More troubling, the Department has actively intervened on behalf of a number of defendant manufacturers charged with vertical price-fixing.

Second, the lack of public enforcement of the RPM prohibition means that we have got to look more closely at decisions that affect private efforts to prove price-fixing. In the *Monsanto* case, the Supreme Court established a difficult evidentiary standard for what plaintiffs must show to have their RPM cases heard by a jury.

In *Sharp*, the Court said that it would find violations only where conspirators set a specific price level.

It is tough to win antitrust cases that aren't automatic violations, so these decisions may signal a green light for manufacturers to drop discounters. For these reasons, I am sympathetic to Senator Metzenbaum's legislation, but I also have a number of questions.

How difficult would it be for producers to terminate substandard dealers under this bill? Would it restrict the rights of manufacturers to choose their own business partners and set their own marketing priorities? And what protections would it give businessmen to make common-sense business decisions? The vast majority of producers have absolutely no interest in fixing prices, and we ought to ensure that they don't face treble damages for legitimate activities.

Finally, as a former businessman, I am prejudiced. I don't want to rely on esoteric legal theories. I want to know the practical effect of current law and the proposed legislation.

Mr. Chairman, I want to assure you and our witnesses that I come here with an open mind. You should be commended for bringing this important legislation to our attention so early in this session.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you very much, Senator Kohl. We appreciate your thoughtful expression and, as a former business person, we certainly are prepared to work with you and see to it that the bill is fair to all parties concerned. We want your support and we will be in touch with you toward developing that situation.

Senator Simon, we are very happy to have you with us this morning.

Senator **Simon**. Thank you, Senator Metzenbaum, and I want to commend you for your leadership here. The basic thrust of what we have here seems to me to be sound. Now, it could very well be that the suggestions made and the questions asked by Senator

Kohl, Senator Grassley, and Senator DeConcini—that there should be some modification.

But I think we have to recognize we are going to have to make sure that the competition is out there; that the free enterprise system really is free.

And I would also join my colleague from Wisconsin in urging the Department of Justice to be more vigorous in its enforcement of the antitrust laws. I have been pleased with the statements issued by the new Attorney General, compared to the statements of his predecessor, but I have to say I have yet to see that vigor shown out there.

Let me finally say, because unfortunately I have to be over on the floor to make sure that O'Hare Airport is safe for everybody who lands—and that probably is quite a few people here in this audience; we have some language worked out on the appropriations supplemental that will help to do that, that one of your next witnesses, Mr. Chairman, is going to be Bob Creamer from Illinois, who has been a champion of consumers and consumer interests. I hope you will listen carefully to Bob Creamer's testimony. I am sure he will do a good job for you here.

Senator **Metzenbaum**. He gives me his firm assurance that he will see to it you come back to the Senate. I will listen very carefully to him.

Senator **Simon**. All right.

Senator **Metzenbaum**. Senator Heflin.

Senator **Heflin**. I haven't really focused yet on this new bill. I remember last year, and last year some type of an agreement was reached by some of the opponents of the bill. Then the report language was not exactly in keeping with the agreement, and then the decision, as I recall, of another Supreme Court case, the *Sharp* case, came along, and that report language would have had a substantial effect upon that decision.

As I look at court cases, there has to be a certain amount of evidence that has to be presented to establish a conspiracy. I will be interested in the hearings and the progress of this bill as it goes along, but I had reservations about the bill, particularly last year. I haven't had a chance to read this bill, but I assume it is similar.

Senator **Metzenbaum**. Thank you very much, Senator Heflin.

Senator **Grassley**. Mr. Chairman?

Senator **Metzenbaum**. Senator Grassley.

Senator **Grassley**. I just have to ask you—I see you have got a new bill title, an emotionally-charged title. Who is in charge of bill titles on your staff? I want to get acquainted with them. I need the access to talent like that. [Laughter.]

Senator **Metzenbaum**. We want each title to relate to the visceral reaction as well as to the legislator's reaction.

Let me say at this point, I am very pleased that so many members have seen fit to attend this hearing this morning. At this point, I will put in the record a list of 186 businesses and manufacturers, and over 100 groups and associations who are presently supporting this bill. Without objection, that list will be included in the record.

[The information of Senator Metzenbaum follows:]

NATIONAL AND STATE GROUPS AND ASSOCIATIONS
SUPPORTING
S.865

Alabama Service Station Association
Alaska Public Interest Research Group
Alliance for Consumer Protection - Beaver County (PA)
American Association of Retired Persons
American Dental Association
Americans For Democratic Action
Arizona Consumers' Council
Arizona United Service Station Dealers Association
Automotive Service Association, Inc.
Automotive Trades of Montana
Automotive United Trades Organization
Bay State Gasoline Retailers Association
Bayou State Gasoline Dealers Association
California Service Station & Auto. Repair Association
Center for the Study of Services-Consumers Checkbook (Wash. DC)
Citizen Alert (NV)
Citizens Action Coalition of Indiana
Coalition Against Price-fixing
Colorado Service Station Dealers Association
Committee to Support the Antitrust Laws
Concerned Consumers League (WI)
Connecticut Gasoline Retailers Association
Consumer Affairs Association (KS)
Consumer Association of Kentucky, Inc.
Consumer Federation of America
Consumers Union
Democracy Project (NY)
Federation of Senior Citizen Clubs & Organizations - FOSCCO (PA)
Florida Consumer Action Network
Florida Consumers Federation, Inc.
Gasoline & Automotive Service Dealers Association, Ltd.
Gasoline Retailers Association of Northeastern New York
Greater Cincinnati Gasoline Retailers Association
Greater Washington/Maryland Service Station & Automotive Repair Assn.
Hawaii Automotive & Retail Gasoline Dealers
Idaho Service Station Association
Illinois Gasoline Dealers Association
The Independent Service Station & Automotive Repair Association of Ohio
Indiana Automotive Service Association
International Mass Retail Association
Iowa Consumers League
Iowa Public Interest Research Group
Kansas Information & Protection Council
Kentucky Gasoline Dealers Association
Lone Star Service Station Association
Long Island Gasoline Retailers Association
Louisiana Consumers League
Michigan Citizens Lobby
Midwest Service Station Association
Minnesota Service Station Association
National Association of Attorneys General
National Association of Catalog Showroom Merchandisers

National Council of Senior Citizens
National Independent Dairy Foods Association
Nationwide Television and Appliance Association
Nevada Gasoline Retailers Association
New Jersey Public Interest Research Group
New York Consumer Assembly
New York State Association of Service Stations, Inc.
North Carolina Consumers' Council, Inc.
North Carolina Retail Furniture Association
North Carolina Service Station Association
North Dakota Retail Gasoline Dealers Association
Northeast Arkansas Citizens Committee
Northern California Petroleum Retailers Association
Northern Ohio Petroleum Retailers Association
Northwest Consumer Council (PA)
Northwestern Ohio Gasoline Dealers Association
Ohio Conference of Service Station Dealers Associations
Oregon Gasoline Dealers Association
Oregon State Public Interest Research Group
Organized Community Action Program (AL)
Pennsylvania Citizens Consumer Council
Petroleum Retailers & Auto Repair Association of Pennsylvania
Petroleum Retailers Organization of Utah
PRO Automotive Association of Missouri & Kansas
Public Citizen
Public Citizen - Texas
Public Citizens Congress Watch
Retail Gasoline Dealers Association of Monroe County, NY
Rhode Island Public Interest Research Group
San Francisco Consumer Action
Service Station & Automotive Repair Association of Pennsylvania/Delaware
Service Station Dealers Assn. of New Mexico
Service Station Dealers of America
Service Station Dealers of Arizona
Service Station Dealers of Arkansas
Service Station Dealers of Florida
Service Station Dealers of Upstate New York
Service Station Operators Association of Southern New York
Small Business Legislative Council
South Carolina Service Station Dealers Association
Select Businessmen's Association (SEBA, Inc.)
Southern California Service Station Association
Southwestern Ohio Gasoline Dealer Association
Texas Service Station Association
Tennessee Retail Gasoline Dealers Association
Tri-State Gasoline & Automotive Dealers Association of Maine, N.H. & Vermont
United Garage & Gasoline Retailers Association of Western New York
Vermont Public Interest Research Group
Virginia Gasoline & Automotive Repair Association
Virginia Service Station & Automotive Services Association
Washington Public Interest Research Group
West Virginia Citizen Action Group
West Virginia Gasoline Dealers & Automotive Repair Association
Western Colorado Congress
Wisconsin Retail Gasoline & Automotive Trades Association

BOLD FACE PRINT DENOTES NATIONAL ORGANIZATIONS

Businesses and Manufacturers Who Support

S.865

A & H Wayside Furniture
Ace Appliance Company (NC)
Ace Appliance Company (TN)
Allied Jewelers & Distributors
American Furniture Co.
Apex, Inc.
Arlette Fashions (Mfgr)
ASR, Inc.
Atchley Appliance & TV
Arthur's Jewelers & Distributors
Associated Charter Catalogs
Auto Home Electronics
B & W TV & Appliance Co.
Bernard Bartikowsky, Inc.
W. Bell, Inc.
Bellows TV Town, Inc.
Best Buy Company
Best Products Company, Inc.
Big Sandy Furniture, Inc.
Birnberg & Sons, Inc.
W. R. Blaire
Boscov's Dept. Stores
Branch-Patton Company
Brandon House Furniture
Brandsmart U.S.A.
Brendle's, Inc.
Bromley Coats (Mfgr)
Burlington Coat Factory Warehouse
C & C Appliance
Campo Appliance Co., Inc.
Cate-McLaurin Company, Inc.
Columbia Photo & Video
Conn Appliance Co., Inc.
Joseph Connor & Sons, Ltd.
Consumers Distributing Co.
Coplan Super Appliance. & TV Ctr.
Costco Wholesale Company
Cousins Photo & Appliance Warehouse, Inc.
Joseph B. Dahlkemper Co., Inc.
Daniels Tobacco Company, Inc.
Dee's, Inc.
The Display Center, Inc.
Don Juan (Mfgr)
Donmore (Mfgr)
Economy TV Center, Inc.
Elder-Beerman Stores Corp.
Elmore's, Inc.
Engles TV & Appliance
Evans Distributors
John W. Eye Company

Claude Fannin Company
Farmers Furniture Company
Fishman & Tobin (Mfgr)
Folgers Superstore
Dean Forrest World
Frank's TV & Appliances, Inc.
Fretter, Inc.
The Furniture House of North Carolina
Furniture Showcase
Garrett-Miller Consumer Warehouse
Fred P. Gattas Company, Inc.
Goldstein Brother, Inc.
W. M. Green & Company
Greenville Television
H. H. Gregg Appliance/J. D. Rich
H & H Service Store
Harry Haga Company
Bill Hall's TV & Appliance
Hamilton Bryan Superstore
Handy TV, Inc.
Heilig-Meyers Company
High Point Furniture Sales
Hills Department Store
Holdren's, Inc.
Hooper's, Inc.
Hoylman-Huffman
Hunt's TV & Appliance Center
Jac's TV & Appliance
Jamesway
Jewelcor Jewelers & Distributors
Jewelcor Merchandising
K-Mart
K's Merchandise Mart
Ed Kellum & Son
Ed Kelly's, Inc.
Kenrick's Catalog Showroom
King's Superstore
Kut Rate Fashions, Inc.
Lack's
Lafayette Sales
Leo's Stereo
L. Luria & Son, Inc.
Major Appliance
Mann's Consumer Sales
Marda TV & Appliance
Matthews TV & Stereo City, Inc.
D. T. McCall & Son
McLaughlin Appliance & TV
Ellis Meares & Son, Inc.
Merchandisers Association, Inc.
A. Michael's Piano, Inc.

Mount Warehouse Showroom
Murray's
Murrow Furniture
Myers Catalog Showroom
National Catalog Showroom
Nationwide of Connecticut, Inc.
North Bay Trading Company
Northwood Bindery
Oak Supply & Furniture
Ohio Valley Wholesale Distributors
Overton's Sports Center
Palm City TV, Inc.
Paysaver Catalog Showrooms
Performance, Inc.
Tom Peterson's, Inc.
The Present Company
Priba Furniture
Prime Value Mart (MA - 2 locations)
Queen City TV & Appliance, Inc.
R & R TV & Appliance
RA-LIN, Inc.
Ray, Inc.
P. C. Richard & Son, Inc.
Pat Riley Warehouse-Showroom
Roberds of Dayton, Inc.
Roberds of Atlanta, Inc.
Roberds of Tampa, Inc.
Rosa's Home Appliance
Rosa & Sullivan
Rose Furniture
Rosenbaum Industries
Roses
Rosner's, Inc.
Saben, Inc.
Sage Furniture & Appliance, Inc.
Richard Sanders (Mfgr)
Schein Dental Equipment Company
Fred Schmid Appliances
Paul Schultz Companies
Score Board Knits (Mfgr)
Service Merchandise Catalog Company
Service Merchandise Company
Servex Electronics
Setzer's, Inc.
Shaw Furniture Galleries
Shopko
Shreveport Refrigeration
Skaggs Appliances, Inc.
Smith's Furniture Company
Sobol House Furniture
Southern Hardware & Supplies

Sport Shop
Sportmart
Stansbury Poplar Place, Inc.
Star Tobacco Company, Inc. (Stroud's)
Star-Way
Sterling Jewelers
Steven's, Inc.
Swallen's, Inc.
Tart's Furniture, TV & Appliance Company, Inc.
Tehan Catalog Showrooms, Inc.
E. H. Tepe Company, Inc.
W. F. Tibor, Inc.
Today's Man
Trader Horn, Inc.
Tri-City Catalog Showroom
Turner-Tolson Furniture
U. S. Merchandise Company
Value House
Virginia Merchandising Corp/FX
Voyles, Inc.
Walmart
Edwards Distributing, Inc. DBA: The Warehouse
David Weis Wholesale Jewelers, Inc.
J. C. Wentzel & Sons, Inc.
Westco. Inc.
Western Appliance
R. C. Willey Home Furnishings
Wilson's Appliances, Inc.
Witmark, Inc.
Wolf Furniture
Wonderknits (Mfgr)
Wood Armfield Furniture
World Radio
Sid Young Distributing Co., Inc.

Senator **Metzenbaum**. We will now proceed forward with our witnesses. We have a 5-minute limit on each of the witnesses. I think they have been apprised of that fact. The Chair, I am frank to say, had hoped to be able to adjourn this by 11:45 so that I might attend the memorial service for Congressman Pepper. I think I may have difficulty in doing that, but I am going to at least try to move along in that direction.

Mr. Lacy Thornburg, Attorney General of North Carolina, who I understand is speaking on behalf of the State attorneys general of the country. Is that correct, sir?

STATEMENT OF LACY THORNBURG, ATTORNEY GENERAL, STATE OF NORTH CAROLINA, RALEIGH, NC, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. **Thornburg**. That is correct.

Senator Metzenbaum and members of the committee, I first want to adopt the statements made by Senators Gorton and Rudman, and indicate to you that, in my opinion, they have done a correct analysis of the bill.

As attorney general of North Carolina and as a member of the National Association of Attorneys General, which supports this bill, I appreciate the opportunity to share with you my views on S. 865.

I would like to ask, Mr. Chairman, that a copy of my remarks be inserted into the record because I am going to be able to include only a part of them in the 5 minutes that has been allotted.

Senator **Metzenbaum**. Without objection, the entire statement will be included in the record. And I might say that with respect to each of the witnesses, their entire statements will be included in the record.

Mr. **Thornburg**. Thank you, sir.

I want to talk primarily about the State of North Carolina and some of the things that are going on down there. We are right now in the throes of some difficult problems in the North Carolina General Assembly, and also in the business climate that has developed there as a result of a bill that has been introduced.

In North Carolina, there are several private lawsuits, a pending investigation by my office, and proposed legislation focusing on severe restraints that most of the high-end furniture manufacturers have recently imposed on the State's widely known discount retail furniture industry.

Because these are pending matters, I don't want to name specific companies, but can do so.

Very briefly, the manufacturers dominating the high end of the market are imposing restrictions that directly prevent consumers from shopping with North Carolina discounters to get the best price.

There is evidence that full-price retailers have induced the manufacturers to adopt these recent restrictions in order to take care of "the North Carolina problem," as the discounters are known in the industry and in some circles.

More recently, it has come to my attention—and I observed what Senator Kohl had to say about this—that the same is true in the luggage market. I want to quote from a couple of letters that went to some of the discount dealers in the Burlington area dealing with luggage.

Part of a paragraph: "Although has for many years published suggested retail prices for its fine products, the suggested retail prices have had little recent impact on discounting. The company now announces as a policy its intention to permanently discontinue doing business with any location of any dealer where company's suggested retail prices are not followed." That is one letter.

Another letter from a luggage manufacturer came at an earlier date to this same discount dealer and he was discontinued from that line in January of 1987. This May 8, 1989, letter is taken as a termination letter as to that manufacturer.

In particular, some manufacturers 'restrictions prevent the retailer from quoting a price over the telephone or by mail to you, the consumer, if you live outside his territory, even if you have done business with this retailer before. Some manufacturers 'restrictions prevent the retailers from selling to you if you live outside the territory unless you sign a contract while you are in the retailer's store.

Some manufacturers prevent the retailers from advertising even his own store name outside of the territory that the manufacturer designates for him.

Keeping in mind that these retailers sell many different brands, one manufacturer's restriction on where the retailer can advertise his own store name directly impedes the retailer's ability to sell any of his other brands.

Now, these restrictions will clearly impair or destroy the discount stores which depend on high sales volume to support both their low prices and also their business cost structures, which were put in place prior to the time that these restrictions were visited upon them.

In other words, several of these dealers have spent hundreds of thousands of dollars to prepare to sell these products and are now being told that they either have to raise their prices to the manufacturer's suggested retail price or they are going to quit being furnished the appropriate line.

Now, in this important industry, consumers 'ability to obtain optimum goods and services at the lowest prices is in peril, and this is largely due to conduct that was encouraged by *Monsanto* and *Sharp*.

And let me make another statement as an aside here, and that has to do with what the manufacturers have done in fighting this bill that is now before the North Carolina General Assembly, and that is to call upon groups of employees and officials in the corporation to get together for rallies and, in no small way, suggest to those who are employed by the manufacturing companies there in the State of North Carolina that unless they go along with the manufacturers and suggest to their Representatives and Senators that they vote against this bill, then it looks as if they are going to have to move their manufacturing facilities to some other States or offshore, or whatever, and they are going to lose their jobs.

Now, I don't like that type of conduct, and I don't think you can get away with it if this bill is put into law. And I don't think you can get away with it in North Carolina anyway; that is what we are looking at down there.

They claim they want to be sure that the retailers provide services, and yet there are no assurances that services will be provided by anyone else to any greater degree.

There is every indication that North Carolina retailers more than meet the manufacturer's very costly showroom or gallery requirements, standards for training sales staff, and postsale service requirements.

These retailers are not free-riders. Nonetheless, many of them are being terminated, and others 'access to new lines is restricted not because they failed to meet these service requirements.

Thank you very much, Mr. Chairman.

Senator **METZENBAUM**. Thank you very much for an excellent statement, Mr. Thornburg. And I want to repeat again, I understand your testimony is on behalf of all of the attorneys general of the United States.

Mr. **THORNBURG**. On behalf of the National Association of Attorneys General, their membership, and, of course, my own personal opinion.

Senator **METZENBAUM**. Thank you. Now, opponents of the proposed legislation say there is no problem in the marketplace that needs correcting. From your testimony, I gather it is your experience and the experience of other attorneys general that price-fixing is indeed a problem today. Am I correct in that?

Mr. **THORNBURG**. Quite correct, Senator, in North Carolina, certainly.

Senator **METZENBAUM**. Do you think the problem is worsening as a result of the *Monsanto* and *Sharp* decisions?

Mr. **THORNBURG**. No question about it. Because of the limitations that are imposed by *Monsanto* and *Sharp,* you definitely need a bill of this kind to give a consumer an opportunity, or a retailer an opportunity to prove his or her case in court.

The limitations that are set by those decisions are very stringent, make it virtually impossible for a person to prove their case, as we see it.

Senator **METZENBAUM**. You testified that manufacturers are using nonprice restraints as a pretext for enforcing price restraints. How can you tell? Can you trust a jury to figure out what is really going on?

Mr. **THORNBURG**. Senator, I think the strongest method of proving a case of this kind has to be circumstantial evidence. These people are not big enough fools to write down that they have agreed on a particular price and set it up in such a way as the price case requires it to be done.

Circumstantial evidence in North Carolina, and I think in most States, is an acceptable form of proof to prove even the most serious criminal cases. I see no reason why it shouldn't be done here.

I think that it would be realistic for this bill as written to be passed, and I hope that the U.S. Senate and Congress generally will see fit to do so.

Senator **METZENBAUM**. And your organization does support my particular piece of legislation?

Mr. **Thornburg**. We support your piece of legislation as it is presently written, and we will help you any way we can.

Senator **Metzenbaum**. And you have both Republicans and Democrats, I am sure, in your organization.

Mr. **Thornburg**. Absolutely, and it is a nonpartisan organization and you never hear the word "politics" mentioned there. [Laughter.]

Senator **Metzenbaum**. I recollect seeing a number of North Carolina furniture businessmen who came up on this subject. Is it the fact that some of them have actually been squeezed out of business already?

Mr. **Thornburg**. This has been fairly recent, and whether they have actually closed their doors in the last few days, I am not sure. But they are in the process of having to do so as to these particular lines; no question about that.

Whether this will be such a blow that they will ultimately have to close their doors, I can't say, Senator. I can say that we are probably going to see a lot of contest over the right of the manufacturers to treat these companies the way that they have by suddenly telling them—after encouraging them to spend all of this money to meet the gallery specifications and to do all the other things that they suggest are necessary to upholding their line, and then suddenly jerk the rug out and leave them with a high indebtedness.

Senator **Metzenbaum**. Senator Thurmond.

Senator **Thurmond**. Thank you.

Mr. Attorney General, we are glad to have you with us.

Mr. **Thornburg**. Thank you, Senator.

Senator **Thurmond**. We have heard of your good work.

Isn't it true that the retailers in your State are free to file an antitrust suit challenging the vertical restraints that you have described today? In other words, neither the *Monsanto* nor *Sharp* decisions prevent them from bringing such a case?

Mr. **Thornburg**. I think, Senator, that statement would be correct. There is nothing to prevent them from suing, and you know, as a former judge—and I had the same pleasure of serving in North Carolina—anybody can sue anybody they want to about anything. But whether they can prove their case is another matter, and I think this bill would help them do it.

Senator **Thurmond**. Would you agree with me that S. 865 is not about whether vertical price-fixing is good or bad, but about the standard of proof for proving such a case and the kind of activities that we would call vertical price-fixing?

Mr. **Thornburg**. I would think more accurately, Senator, it is about whether it is good or bad since it makes it easier to prove a case to show that it is bad.

Senator **Thurmond**. To focus just on the evidentiary standard, it seems to me that the standard of proof set forth in this bill is like assuming that an individual found with a knife is guilty of murder. It may be that possession of the knife is highly probative and very relevant, but I am sure you would agree that more evidence would be needed before a verdict of guilty could be reached. Why isn't that also true here?

Mr. **Thornburg**. Well, I think what *Monsanto* and *Sharp*, construed together, say is, number one, you have to have definite proof of a specific agreement, a smoking-gun type agreement, and *Sharp* says you have to prove a specific price.

What this bill would allow, as I understand it, would be the opportunity for the person who is bringing the suit, the corporation that is bringing the suit, to use what I would normally term circumstantial evidence to prove the case.

And you wouldn't have to have a smoking gun; you wouldn't have to have a person standing over a corpse with the smoke coming out of the end of the barrel.

Senator THURMOND. The *Monsanto* decision, I believe, was a unanimous decision.

Mr. THORNBURG. Yes, sir, it was.

Senator THURMOND. Do you think the judges didn't understand the issue in that case?

Mr. THORNBURG. You know, Senator, I don't know how to answer that, except you and I both frequently don't understand why they do things, and I thought that was a bad decision.

Senator THURMOND. That was a unanimous decision of the Supreme Court of the United States.

Mr. THORNBURG. Yes, sir, it was.

Senator THURMOND. The *Sharp* decision was a six-to-two decision.

Mr. THORNBURG. Correct.

Senator THURMOND. And you disagree with both those decisions?

Mr. THORNBURG. I do, yes, sir.

Senator THURMOND. That is all. Thank you.

Senator METZENBAUM. Senator Grassley, if you can get your questions in before the five bells go off——.

Senator GRASSLEY. I hope I can.

In your statement, you complained about the efforts of some manufacturers in your State to prevent retailers from operating outside of their assigned territories. Aren't these examples of vertical territorial customer and location restrictions that are now governed by the rule of reason?

Mr. THORNBURG. Yes, sir.

Senator GRASSLEY. Isn't rule of reason treatment for these practices guaranteed by section 5 of S. 865?

Mr. THORNBURG. Yes, it is.

Senator GRASSLEY. If you agree that these restrictions are and will be governed by the rule of reason, how can these practices be cited in support of the enactment of S. 865, because aren't they, in fact, irrelevant to the bill?

Mr. THORNBURG. No, I don't think they are irrelevant to the bill. What I am saying is that the practices down there have become that of controlling the prices as well as the territory, and it is all being lumped in there together.

The way the discount furniture industry operates in North Carolina—people call in from all over the country as a result of what they see in a catalog or what they see from passing through the area, and order their furniture, and they ship all over the country and all over the world. That is what is causing the problem to the manufacturers, at least, they say.

Senator GRASSLEY. Well, if you are saying that these are, in fact, price-fixing agreements and should be illegal per se, how are we to distinguish between the territorial restrictions that are permissible and those that are not?

Mr. THORNBURG. That is the beauty, Senator, of having a jury come in and sit in a jury box and be given a reasonable opportunity to decide on the basis of whatever evidence is offered what the basis of that arrangement is. Is it really what is permitted as a territorial consideration or a gallery requirement, or whatever, or is it simply a price-fixing arrangement?

We say that, well, the two paragraphs you heard from these letters—and these aren't the only letters—they are, I thought, right brazen about it. You either maintain our prices or you don't get any more of our goods.

Senator GRASSLEY. If you want to apply S. 865 to such practices, then, it seems to me that you are encroaching very dramatically on a manufacturer's ability to use nonprice vertical restraints, aren't you? In fact, aren't you then undermining the *GTE Sylvania* case where the rule of reason treatment for such restraints was possible?

Mr. THORNBURG. I don't think so, Senator. I think the question becomes what the purpose is and what the result is.

Senator GRASSLEY. Well, what sort of guidance are you leaving the manufacturers, then, about nonprice vertical restraints—what are permissible and what are not permissible?

Mr. THORNBURG. You are leaving what they have now, the case law in the field. I don't think that has changed, the nonprice vertical restraints, and they talk about territorial assignments, and so forth. It is all protected here in the bill, if I understand it correctly, and I think you quoted from a part of it, Senator.

[The statement of Mr. Thornburg follows:]

STATEMENT OF

LACY H. THORNBURG, ATTORNEY GENERAL

OF NORTH CAROLINA AND MEMBER OF

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 865, "THE CONSUMER PROTECTION

AGAINST PRICE-FIXING ACT OF 1989"

JUNE 1, 1989

Mr. Chairman and members of the Committee, as Attorney General of North Carolina and as a member of the National Association of Attorneys General, which supports this bill, I appreciate this opportunity to share with you my views on S. 865.

The legislation that you are considering today is needed to correct the ill effects of two recent Supreme Court opinions regarding vertical price fixing, Monsanto[1] and Sharp[2]. I believe these opinions together have come to serve as an invitation for unscrupulous suppliers, at the behest of full price retailers, to terminate discounters. These types of agreements are a fraud upon the marketplace. They harm competition, discount retailers, and consumers. Monsanto and Sharp have made proving such illegal agreements much more difficult, and they have done so without good reason. A comparison of the nature of these cases with the Court's treatment of them shows why.

The classic price fixing conspiracy by sophisticated merchants may hinge on only a nod and a wink. Such merchants will certainly have no written contract. Any communications between them to establish or carry out such an agreement will be disguised or well concealed. As a result, proof of an agreement to suppress price competition is usually by circumstantial evidence. But in practice the courts' application of Monsanto and Sharp has resulted in dismissal of vertical price fixing cases. That is, courts do not allow a jury to consider the evidence unless the evidence includes direct proof of an agreement between the supplier and the complaining dealer, and which specifies that dealer's price or price level. This standard of proof is unrealistic, and is not the rule in other types of price fixing cases.[3] This bill would correct the harmful results flowing from Monsanto and Sharp and would better protect competition and consumers.

Sharp and Monsanto are based on the dubious assumptions, first, that price discounting is bad for competition because discounters might not provide consumer services that suppliers want them to; and second, that artifically high prices are good for competition because, instead of enjoying the extra profits, retailers will spend them on providing consumer services urged by suppliers. The Court's adoption of these flawed assumptions reflects its willingness to let suppliers, spurred on by full price retailers, decide what is best for consumers. Not surprisingly, some suppliers believe that what is best for consumers is high prices along with salesmanship "services" designed to convince consumers that the prices are not high.

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[1] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

[2] Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988).

[3] See, e.g., Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980) (agreement for raising, depressing, fixing, pegging or stabilizing the price constitutes price fixing).

In furtherance of these dubious policy assumptions against price competition, the Supreme Court's Monsanto and Sharp opinions impose an unreasonable standard of proving vertical price fixing. Under these cases, it is more difficult to prove the existence of an illegal vertical price fixing agreement than is elsewhere required in the law to show the existence of a legal agreement. These cases have also reinforced the U.S. Department of Justice's damaging "hands off" policy toward all vertical restraints. That policy has invited suppliers to impose severe vertical restraints which may only be pretexts for vertical price fixing.

In North Carolina there are several private lawsuits, a pending investigation by my office, and proposed legislation focusing on severe restraints that most of the high-end furniture manufacturers have recently imposed on the state's widely known discount retail furniture industry. Because these are pending matters, I do not want to name specific companies or go into great detail. Very briefly, manufacturers dominating the high end of the market are imposing restrictions that directly prevent consumers from shopping with the North Carolina discounters to get the best price. There is evidence that full price retailers have induced the manufacturers to adopt these recent restrictions in order to "take care of" the "North Carolina problem," as the discounters are known in some circles.

In particular, some manufacturers' restrictions prevent the retailer from quoting a price over the telephone or by mail to you, the consumer, if you live outside his territory, even if you have done business with the retailer before; some manufacturers' restrictions prevent the retailer from selling to you, if you live outside his territory, unless you sign the contract while in the retailer's store; some manufacturers' restrictions prevent the retailer from advertising even his own store name outside of the territory that the manufacturer designates for him. Keeping in mind that these retailers sell many brands, one manufacturer's restriction on where the retailer can advertise his own store name directly impedes the retailer's ability to sell any of his other brands. These recent restrictions will clearly impair or destroy the discount stores which depend on high sales volume to support both their low prices and also their businesses' cost structures which were put in place prior to these restrictions. These are the businesses and livelihoods of people who have built up a well-regarded furniture retail industry based on offering high quality goods and full services at low prices. In this important industry consumers' ability to obtain optimum goods and services at the lowest price is in peril, and this is largely due to conduct encouraged by Monsanto and Sharp.

The furniture manufacturers claim that they want to be sure that retailers provide "services". Yet there is every indication that North Carolina retailers more than meet the manufacturers' very costly showroom or "gallery" requirements, standards for trained sales staff, and post-sale service requirements. These retailers are not "free riders". Nonetheless, many of them are being terminated, and others' access to new lines is restricted, and not because they somehow fail to meet these service requirements. While the manufacturers have constructed elaborate justifications for these restrictions, it should be open to a jury to determine on such facts whether their real purpose is to eliminate or curtail price competition.

Senate bill 865 would correct the harmful policy against price competition that Sharp and Monsanto represent. The bill would allow the jury to consider whether a competing retailer's threat, complaint, or demand that the supplier curtail or eliminate price competition is the major contributing cause of the supplier either refusing to supply a full line of products to the discounter, or terminating him. This is a sensible rule of law.

I believe that if suppliers want retailers to render important consumer services, they should impose reasonable requirements to that end, police compliance with them, and terminate those who will not comply. However, I also believe that our national policy should be designed to assure that suppliers who terminate the best retail competitors -- possibly destroying discount retailers' businesses and putting their employees out of work -- at least do so for a reason that is not just a pretext for suppressing price competition at the behest of full price retailers.

Congress' longstanding policy in favor of price competition deserves better treatment than the courts have given it in recent vertical price fixing cases. I urge you to support this bill as a reasonable means of discouraging vertical price fixing by allowing those who have been injured by such anti-competitive agreements to have their day in court.

Questions from Senator DeConcini

To Attorney General Thornburg:

1. In discussing the pending North Carolina cases involving furniture manufacturers, you listed a number of restrictions that the high-end manufacturers are taking to directly prevent consumers from shopping with discounters.

(--restrictions preventing the retailer from quoting a price over the telephone or by mail to consumers if they live outside a given territory;
--restrictions preventing a retailer from seling to a consumer if he lives outside a given territory unless he signs a contract while in the retailer's store;
--restrictions preventing a retailer from advertising outside a territory that the manufacturer designates for him)

M. Thornburg, if S.865 is adopted, won't manufacturers be encouraged to resort to harmful restrictions such as these rather than terminate agreements with distributors or to adopt a policy of not initially entering into relationships with discounters rather than risk facing a jury and possible treble damages?

2. You have stated that S.865 would correct the harmful policy against price competition that Monsanto represents.
But, Ms. Thornburg, the Monsanto Court affirmed a jury award for $10,500,000 finding that there was sufficient evidence of price-fixing. Why doesn't this indicate that the Monsanto standard is adequate to protect discounters against vertical price restraints?

State of North Carolina
Department of Justice
P.O. BOX 629
RALEIGH
27602-0629

LACY H. THORNBURG
ATTORNEY GENERAL

June 28, 1989

Ms. Theresa Lauerhaus
Senate Judiciary Committee
Antitrust Subcommittee
Washington, D.C. 20510

Dear Ms. Lauerhaus:

Senator Metzenbaum forwarded to me two written questions from Senator DeConcini regarding S.865. This letter provides my responses.

1. Senator DiConcini, instead of encouraging manufacturers to impose onerous restrictions on discounters in response to full-priced retailers' complaints about price cutting, I believe that passage of S.865 would discourage such conduct which may only be a pretext for curtailing price competition. Concerning whether passage of S.865 would induce manufacturers initially not to enter into any relationships with discounters, S.865 simply returns the law on vertical price fixing to that existing prior to Monsanto and Sharp. I am unaware of any indication that manufacturers hesitated to deal with discounters before those decisions. Indeed, the notable growth of discounting during the last ten to twenty years indicates that the law prior to Monsanto and Sharp did not deter manufacturers from initially dealing with discounters. I see no reason why a return to that law would have a different effect.

2. It is certainly correct that the Monsanto Court found sufficient evidence of price fixing to uphold the award of damages in that case. However, Monsanto was extraordinary because the evidence included direct proof of an overt agreement between the manufacturer and full-priced retailers on resale prices. The Court's imposition of the requirement that the evidence in all vertical price fixing cases include proof of such an overt agreement is unrealistic. That requirement does not adequately protect discounters against sophisticated manufacturers whose resale price agreements with full priced retailers may be concealed.

Ms. Lauerhaus, please convey to Senator Metzenbaum my thanks for the opportunity to share my views with the committee.

Sincerely,

LACY H. THORNBURG
Attorney General

LHT/pj

Senator **Grassley**. The Chairman asked me to recess until he returns after the vote. So the committee meeting is recessed for probably about 10 minutes.

[Recess.]

Senator **Metzenbaum**. I am sorry about the interruption, but there is nothing much we can do about that. I would just remind the witnesses we have a 5-minute rule.

We have Mr. Ray Zimmerman, although I don't see him. Yes, I do. He lost a lot of weight.

Mr. **Zimmerman**. Yes, sir.

Senator **Metzenbaum**. Yes, sir, you lost a lot of weight. I didn't recognize you.

Robert Creamer, and Robert Pitofsky. Mr. Zimmerman, please proceed.

STATEMENT OF A PANEL CONSISTING OF RAYMOND ZIMMERMAN, SERVICE MERCHANDISE COMPANY, NASHVILLE, TN, ON BEHALF OF THE INTERNATIONAL MASS RETAIL ASSOCIATION; ROBERT B. CREAMER, EXECUTIVE DIRECTOR, ILLINOIS PUBLIC ACTION COUNCIL, CHICAGO, IL; AND ROBERT PITOFSKY, PROFESSOR OF LAW, AND DEAN, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. **Zimmerman**. Before I begin, Mr. Chairman, I would like to introduce myself and take this opportunity to thank you for allowing me to testify here today. I am Raymond Zimmerman, Chairman and CEO of Service Merchandise Company, a 324-store catalog showroom chain which I, along with my late mother and father, started almost 30 years ago in one store in downtown Nashville, Tennessee.

I am here today on behalf of the International Mass Retail Association, the trade association of the retail discount industry. Let me ask that our formal written statement be included in the record, and I will summarize a few critical points.

For the record, also, let me submit a paper which analyzes the economics of vertical restraints. This analysis by Professor William S. Commoner of the University of California-Santa Barbara was prepared for IMRA and the National Association of Catalog Showroom Merchandisers.

[The information of Mr. Zimmerman follows:]

THE TWO ECONOMICS
of
VERTICAL RESTRAINTS

William S. Comanor

University of California, Santa Barbara

June 1, 1989

Statement submitted to the Committee on the Judiciary, United States Senate in support of S. 865. It was prepared at the request of discount retailers, including the National Association of Catalog Showroom Merchandisers and the International Mass Retail Association, but is based on much earlier work. It extends prior testimony on this subject submitted at the request of the Committee on the Judiciary, U.S. House of Representatives on February 24, 1988. I am grateful to my colleague, Professor H.E. Frech, for helpful comments and suggestions.

SUMMARY

This paper reviews the economics of vertical restraints, which includes resale price maintenance as well as other market restrictions. For the most part, these vertical restraints are designed specifically to achieve higher consumer prices, and there is considerable evidence that they have had these effects. Thus, Senators Hart and Brooke estimated in 1975 that vertical price restraints cost American consumers between $2 and $3 billion per year.

There are two economics of these restraints where the different explanations follow from different sets of motivating factors. The first economics presumes that these restraints are imposed by manufacturers on their distributors. Free rider arguments fall in this category. However, these explanations typically assume that the distribution sector is atomistically competitive without any economic power.

Even when vertical restraints can be explained in this manner, their normative implications are in doubt. The automatic connection between the interests of manufacturers and consumers, presumed by many, does not exist. Consumers may well be harmed, not benefited, when these restraints are imposed, even though they increase manufacturer profits.

In contrast, the second economics of these restraints rests on a more accurate account of the distribution sector. Where retailers and other distributors can influence consumer purchasing decisions, they may have substantial power over their suppliers. One means to exercise this power is to require supplying manufacturers to enforce vertical restraints. In these circumstances, vertical restraints increase prices and restrict outputs, and thereby have the same economic effects as horizontal restraints.

Because vertical restraints often result in consumer harm, antitrust rules should be fashioned on that basis. For antitrust policy to tolerate such restraints is to reverse long established standards. Legislation that resale price maintenance is *per se* unlawful is needed to reaffirm our recognition of the economic benefits of price competition at the retail level.

Introduction

In the past 15 years, there has been a radical shift in antitrust standards toward vertical restraints. It was only in 1975 that the Congress reinstituted the antitrust prohibition against vertically imposed price restraints. In that year, it repealed both the Miller-Tidings Act of 1937 and the McGuire Act of 1952 which had authorized state fair trade laws. Congressional leaders estimated that vertical price restraints cost American consumers between $2 and $3 billion per year, and President Ford endorsed this legislative change.[1]

Despite the general hostility towards these restraints that existed at the time, more recent policy actions rest on a greater tolerance and acceptance of their economic effects. Not only has neither antitrust agency brought a single new case dealing with vertical price or non-price restraints[2] since 1981, but also the Antitrust Division has become the champion of these restraints. Indeed, one commentator has noted that the Vertical Restraints Guidelines, published by the Department of Justice, "would, if adopted by the courts, virtually terminate all litigation involving vertical non-price restraints."[3] While some cases involving vertical price restraints might remain, the standards here also would become far more relaxed.[4]

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[1] These figures appear in the opening statements of Senator Philip A. Hart, Democrat of Michigan and Senator Edward A. Brooke, Republican from Massachusetts. Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, United States Senate, *Hearings: Fair Trade Laws*, 94th Congress, 1st Session, February 18, 1975, pp.1-2.

[2] In this statement, the focus is on restraints enforced by manufacturers on their distributors in regard to minimum resale prices, market areas or customers.

[3] George A. Hay, "The Interaction of Market Structure and Conduct," Donald Hay and John Vickers, eds., *The Economics of Market Dominance*, 1987, pp. 116-117.

[4] U.S. Department of Justice, Brief for the United States as *Amicus Curiae* in support of Petitioner, *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914.

This shift in policy directions is so striking, albeit from one Republican administration to another, that one should ask whether we have learned so much in so short a time to warrant this kind of reversal.[5] What factors could account for so sudden a shift in policy directions?

The response of current antitrust officials is that the new learning on vertical restraints, associated with the Law and Economics departments at the University of Chicago, point in this direction. We understand more about their true economic effects, so the arguments proceeds, and current policy standards merely reflect this new and broader understanding. There is also the suggestion that our prior knowledge of these matters was severely deficient.

What has developed recently is a revised approach towards the economics of vertical restraints, which is far more hospitable towards their presence. However, despite the proclamations of its antagonists, the original economics of these restraints has not been discarded. While its voice is less shrill, its presence is represented by various recent commentary on the subject.[6] In effect, there are two economics of vertical restraints. Each rests on very different premises with different economic consequences. In this statement, I explore both of these economic explanations as well as the normative judgments that flow from each of them. I also review the evidence available to discriminate between the two explanations and consider the policy standards that should follow.[7]

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[5] For a discussion of this transition, see Lawrence J. White, "The Revolution in Antitrust Analysis of Vertical Relationships: How Did We Get from There to Here?" Robert J. Larner and James W. Meehan, Jr., eds., *Economics and Antitrust Policy*, 1989, pp. 103-121.

[6] See for example F.M. Scherer, "The Economics of Vertical Restraints," *Antitrust Law Journal*, Vol. 52, 1983, pp. 687-707; William S. Comanor, "Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy," *Harvard Law Review*, Vol. 98, March 1985, pp. 983-1002; Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing," *Georgetown Law Journal*, Vol. 71, 1983, pp. 1487-1495; and Willard F. Mueller and Frederick E. Geithman, "An Empirical Test of the Free Rider and Market Power Hypotheses," April 12, 1989, University of Wisconsin, unpublished manuscript.

Some Preliminary Evidence

Before turning to the two economics of vertical restraints, it is useful to review some evidence on the economic effects of these restraints. There is general consensus on this evidence, perhaps because it is consistent with both accounts. What it deals with is the impact of vertical restraints, largely in the form of resale price maintenance, on consumer prices.

The empirical literature on this subject is voluminous but has been ably surveyed in a 1983 FTC report.[8] The author concludes that "the price surveys indicate that RPM in most cases increased the prices of products sold with RPM, although this was not always the case."[9] With few exceptions, the evidence is uncontroverted that vertical price restraints lead directly to higher consumer prices. The estimates of Senators Hart and Brooke reported above rest on this evidence.

Among the studies surveyed in the FTC report are two conducted by the Department of Justice that compare prices in fair trade and non-fair-trade areas prior to the repeal of the antitrust exemption in 1975. In a 1956 study, "prices in non-fair-trade areas were as much as 27% lower than in fair-trade areas, [while] ... in a 1970 study the Justice Department found that prices on comparable items were from 0.2 to 37.4% lower in free-trade than in fair-trade areas."[10]

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[7] Both the analytics and policy implications of maximum resale price fixing are very different from that considered here. This statement does not examine those issues but rather deals with restraints that lead to increased distribution margins.

[8] Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economics Staff Report to the Federal Trade Commission, November 1983, Chapter VI, pp. 106-163.

[9] *Ibid.*, p. 160.

A more recent study of the effects of RPM on liquor prices provides confirming evidence. The authors determine that these restraints led to increased consumer expenditures of nearly $227 million in 1978, which was 4.5% of retail liquor sales in the states affected.[11] Evidence on such price effects is not limited to the United States. The FTC report also reviews evidence from Britain, Canada, Sweden and Denmark.[12] For the most part, similar results were found.[13]

Even those who see few competitive problems with these restraints acknowledge their effects on consumer prices. These effects, however, have become a virtue and are now viewed as representing the gains to consumers from these restraints. The higher prices paid are the compensation to retailers or other distributors for their services on behalf of the manufacturer's products. As Judge Easterbrook exclaims, "every argument about restricted dealing implies that the restrictions influence price. There is no such thing as a free lunch; the manufacturer can't get the dealer to do more without increasing the dealer's margin."[14] In essence, the first economics of these restraints is one that emphasizes the gains to consumers as reflected in the additional amounts paid for the products they purchase.

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[10] *Ibid.*, p. 112.

[11] Stanley I. Ornstein and Dominique M. Hanssens, "Resale Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits in the United States," *Journal of Industrial Economics*, Vol XXXVI, September 1987, p. 15.

[12] *Ibid.*, pp. 149-157.

[13] See also B.S. Yamey, ed., *Resale Price Maintenance*, 1966 for studies of the effects of resale price maintenance in various countries.

[14] Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason," *Antitrust Law Journal*, Vol. 53, 1984, p. 156.

The First Economics of Vertical Restraints

Although vertical restraints arise primarily in contractual agreements between manufacturers and distributors, an essential feature of the first economics is the assumption that the restraints result from the incentives of the manufacturer. Retailers and other distributors are generally represented as a competitive swarm with no influence on the actions of their suppliers. Thus, Easterbrook writes that "retailing is about as close to an atomistic market as you can get."[15] Their only alternative is to refrain from distributing the product. Since free entry is also assumed, there will always be a sufficient number of distributors so long as minimal profits are earned. Distributors merely respond to the manufacturer's actions. The relevant question is whether or not manufacturers wish to see these restraints imposed. Where they exist, therefore, they must be at the behalf of the manufacturer.

An early account of circumstances where manufacturers wish to impose these restraints appears in Telser's analysis of the free rider.[16] Telser observed that the quantity sold of a manufacturer's product depends on the final price paid by consumers so that manufacturers normally gain from minimum resale margins. However, he suggested, manufacturers often wish to see certain services provided along with the product, that will increase demand for the product. By "services" Telser referred not only to delivery, credit and repair services, but more particularly to selling, advertising and promotional activities. These services, however, were costly so that a higher product price must be charged. Still, the supply of these services leads to higher manufacturer profits so long as their positive effect on demand outweighs the depressing effect of the accompanying price rise.

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[15] *Ibid.*, p. 141.

[16] Lester G. Telser, "Why Should Manufacturers Want Fair Trade?" *Journal of Law and Economics*, Vol. 3, October 1960, p. 86.

The manufacturer can affect the level of services, Telser assumes, only by restricting competition among his distributors. He cannot simply lower his price to provide additional revenue to distributors to cover the cost of the added services. Even if some distributors would provide the additional volume of services, recognizing that greater sales will result, others will not; and instead will compete by setting a lower price. For these distributors, the lower manufacturer's price is simply an invitation to lower their own price to consumers.

In this setting, the classic "free rider" problem emerges:

> Sales are diverted from the retailers who do provide these special services at the higher price to the retailers who do not provide the special services and offer to sell the product at the lower price. The mechanism is simple. A customer, because of the special services provided by one retailer, is persuaded to buy the product. But he purchases the product from another paying the latter a lower price. In this way the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product.[17]

In these circumstances, the high price, high service distributors are at a competitive disadvantage. Their response must be to stop providing the services. As a result, fewer services are supplied and product sales are lower. Telser's solution is for manufacturers to establish minimum resale prices and thereby force distributors "to compete by providing special services."[18]

While the economics is logically correct, there are various factors which limit its applicability. Foremost is the fact that the free rider problem does not discourage distributors from providing all types of services. Those services provided subsequent to sale -- such as delivery, repair, and instruction on the proper use of the product -- are not subject to a free ride because consumers cannot obtain them without charge from one distributor yet purchase the product from another. More generally, as Telser acknowledged,[19] no free rider problem exists when dealers can sell the product and services separately. In such instances, consumers can purchase the volume of services they prefer and no restraints are needed to ensure their supply.

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[17] *Ibid.*, p. 91.

[18] *Ibid.*, p. 92.

This latter point applies more generally. Whenever it is feasible to charge separately for the service and the product, no free rider problem need exist. Indeed, that situation is more preferred because consumers who want the services can obtain them at an appropriate cost, while consumers who find the services less valuable or too costly can do without and need not pay for them. Only when services are necessarily tied to the product can free rider problems exist. For example, it may be prohibitively expensive for distributors to charge separately for advertising or pre-sale product information. In this case, there is no alternative but to set a single price for both product and services. Free rider problems are therefore more likely to restrict the supply of information than other kinds of services.

To the extent that consumer information is the service at issue, we are typically dealing with consumers who are ignorant about the attributes of the product. Where consumers are more informed, perhaps because of past experience with the product or through advertising messages supplied by the manufacturer, or alternatively because the product's attributes can be gleaned through inspection, free rider problems should be minimal. There are only limited circumstances where free rider problems can occur.

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[19] *Ibid.*

It is not surprising that Telser's account has received little empirical support. Following a review of the available literature, Professor Scherer concludes that although the free rider problem may occur, "its empirical significance appears modest."[20] The economic consultant for Monsanto takes a similar position in regard to the facts of *Monsanto Co. v. Spray-Rite Service Corp.*[21] Referring to that case, he writes, "as many authors have commented, the free riding story, while elegant, internally consistent, and capable of explaining a number of anecdotes, does not seem to fit this particular set of facts very well."[22] And finally, after intensively reviewing five recent FTC cases dealing with vertical restraints, an FTC report finds that there "was little evidence that RPM was imposed to prevent free riding on product-specific dealer services."[23]

In place of Telser's explanation, the FTC Report substituted a more extended definition of dealer "services." The authors find that in the five cases they studied,

> vertical restraints were being used to protect the symbol of high quality created by the retailers' general method of doing business. By carrying the manufacturers' products, retail stores with high quality reputations signal that the products are of high quality, thereby helping the manufacturers establish or maintain their products' reputation. [Furthermore] this signal of high quality is free ridable; other retailers could refrain from the expense of creating a quality reputation, yet have their sales of the

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[20] F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2nd edition, 1980, p. 593n.

[21] 104 S. Ct. 1464 (1984).

[22] Frederick R. Warren-Boulton, "Resale Price Maintenance Re-examined: *Monsanto v. Spray-Rite*," John E. Kwoka and Lawrence J. White, eds., *The Antitrust Revolution*, 1989, p. 394.

[23] Ronald N. Lafferty, *et al.*, "Introduction and Overview," Ronald N. Lafferty, *et al.*, *Impact Evaluations of Federal Trade Commission Vertical Restraint Cases*, Federal Trade Commission, August 1984, p. 27.

> manufacturers' products benefit from the certification efforts of quality signaling dealers.[24]

This extension of Telser's original free rider hypothesis is more plausible. Retailers and other full service distributors may well identify high quality products and certify them to consumers. The latter task is particularly relevant since considerable in-store amenities may be required for consumers to accept their judgments. Since both the evaluation and certification tasks are costly, the full-line distributors who perform these services must charge a higher price, and it is the resulting price difference between their price and the price that can be charged by distributors who do not perform these services that opens the door to a free rider problem.

However, this argument also has important limitations. First, it rests on the premise that all price differences between the two classes of retailers are explained by the costs of style and quality certification. Other costs, and profit margins, must be the same. If there are efficiencies in the distribution process that are associated with, say, discount houses, then any movement of consumers among types of distributors is associated not with free riders but instead with competition. Furthermore, innovations in the distribution process have the same effects. Indeed, the introduction of more efficient distribution methods invariably creates price differences among distributors which have nothing to do with free riders.

A second limiting factor may be even more important. The free rideability of quality certification, presumed readily by the authors of the 1984 FTC report, requires a particular form of consumer behavior. In effect, what must occur is that consumers visit or otherwise learn of the brands carried by full-line distributors but purchase the product at a lower price from discount houses.

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[24] *Ibid.*, p. 34. See also Howard P. Marvel and Steven McCafferty, "Resale Price Maintenance and Quality Certification," *Rand Journal of Economics*, Vol. 15, Autumn 1984, pp. 346-359.

> At issue is the extent to which consumer perceptions of a product turn on the particular outlets through which the products are sold, and whether these perceptions are readily transferable from distribution outlet to brand so that consumers will search for the brand in other, less quality- or style-conscious outlets. Transferability of consumer perception from store to brand is a critical requirement for the free rider explanation.[25]

To be sure, consumers are not all alike, and the perceptions of some could be transferable among distribution outlets. However, it is only in regard to such consumers that a free rider problem can exist.

But even for that class of consumers, the possibility of free riders is not sufficient to describe its impacts on the allocation of resources. Recall that Telser's original account rested on two factors: (1) the prospect that low-service distributors sell at a lower price and thereby attract some consumers who had already received the particular service from full-line distributors, and (2) the loss of customers leads the original distributors to refrain from providing the services so that fewer are provided. Telser's original account rested on both aspects of the problem.

However, the extended version of the free rider problem, where the relevant "service" is style or quality certification, raises other concerns. These certification activities have the characteristic of a public good, in that providing them to consumers who eventually purchase the product from low-priced distributors does not detract from the volume available to consumers who remain with the original distributor. As a result, it is less likely that original, full-service distributors will totally change their mode of doing business simply because some customers have left them. What is relevant is not merely the presence of a free rider problem but rather the magnitude of the problem: is it sufficient to put full-service distributors out of business or will it merely reduce their sales levels without substantially limiting their certification activities? A difficulty with the unfettered free rider hypothesis is that it can be used to justify a permanent restriction on competition.

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[25] William S. Comanor, "Vertical Arrangements and Antitrust Analysis," *New York University Law Review*, Vol. 62, November 1987, p. 1158.

A related issue is posed and answered by F.M. Scherer in the following passage:

> Do the high-quality stores need the special protection of resale price maintenance to warrant their stocking of innovative products? Clearly, the headstart and advantage they have in serving pioneering but wary consumers provide a period during which they can charge premium prices before discount store competition takes hold. Are these advantages, plus the reputation advantage they enjoy ... sufficient to cover the costs of certification ... ? Indefinite protection through permanent RPM could be both unnecessary and, by slowing products' movement into the mature, price-competitive stages of their life cycles, cost consumers much while providing few incremental benefits.[26]

While the free rider problem raises legitimate concerns, its mere presence is not sufficient to determine policy directions. What is more relevant is its prospective impact on the allocation of society's resources. In some circumstances, its presence might restrict the supply of distribution services. But in others, it might instead limit the high returns that full-service distributors would otherwise receive with little impact on their mode of doing business. Their profits depend on their way of doing business, and it seems unlikely that they would turn themselves into discount houses in the absence of vertically imposed restraints. Yet, that is required under the free rider hypothesis.

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[26] F.M. Scherer, *Industrial Market Structure and Economic Performance*, 3rd edition, Chapter 15, manuscript. p. 21.

To this point, we have examined the first economics of vertical restraints but only in terms of the positive economics, or the factors that give rise to the restraints. What has not been considered to this point are what evaluative judgments should be made, and how one should appraise a market situation in the presence of these restraints from that which would exist in their absence. These latter issues concern the normative economics of these restraints.

Normative Aspects of the First Economics

Telser's original analysis explained why manufacturers might wish to impose vertical restraints. What it did not do, nor claim to do, is determine whether the supply of additional distribution services promotes efficiency. That task was addressed by Robert Bork, who proposed a simple test for the economic efficiency of vertical restraints: restrictions in output are anti-competitive while increases in output are pro-competitive.[27] Using this criterion, Bork concluded that vertical restraints must promote efficiency because they lead to higher manufacturer profits only when output is increased. Because a manufacturer imposes vertical restraints only when they lead to higher profits, Bork's contention is that the restraints must be pro-competitive.[28] And therefore, the interests of consumers coincide with those of the manufacturer.[29]

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[27] Robert H. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II," *Yale Law Journal*, Vol. 75, 1966, pp. 375-376.

[28] This conclusion is restated in the Department of Justice brief in *Spray-Rite*. See note 4 above.

[29] Like Bork's article, Basil Yamey's book on resale price maintenance in various countries was published in 1966. In the opening chapter, he examines the same issues as Bork but reaches quite different conclusions. Instead, his position is more consistent with that presented here. See B.S. Yamey, "Introduction: The Main Economic Issues," B.S. Yamey, *op. cit.*, pp. 12-17; and also B.S. Yamey, *The Economics of Resale Price Maintenance*, 1954.

While that conclusion would be correct if all consumers were identical, it is not so when there are differences among consumers in the importance they attach to dealer services and/or style or quality certification. Where such differences exist, the interests of manufacturers and consumers do not necessarily coincide, and one cannot draw the conclusions reached by Robert Bork and accepted by the Department of Justice.

The decision by a manufacturer to impose vertical restraints turns on the response of a certain class of marginal consumer to the additional "services" provided by distributors, while the general effect of vertical restraints on efficiency depends on the response of all consumers, inframarginal as well as marginal.[30] As a result, the presumed connection between the interests of manufacturers and consumers is broken, and the mere fact that manufacturers impose vertical restraints does not necessarily indicate that they serve the interests of consumers.

This analysis demonstrates that the welfare effects of vertical restraints are ambiguous. However, Professor Scherer writes that: "under plausible conditions, a tendency towards welfare reductions seems more likely than the opposite."[31] His reason is that consumers with strong preferences for the manufactured product even without the restraints, presumably are informed about its characteristics and hardly require that its style or quality be certified. Accordingly, the restraints add little to the reservation price of these consumers for the product. On the other hand, consumers with fairly low reservation prices, which indicate they are on the margin between buying or not buying the product, are likely to be those for which the certification features or distribution services are particularly important. And it is these consumers who are particularly relevant to manufacturers when they decide to impose the restraints.

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[30] See William S. Comanor, "Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy," *Harvard Law Review*, Vol. 98, March 1985, pp. 983-1002; William S. Comanor and Jack Kirkwood, "Resale Price Maintenance and Antitrust Policy," *Contemporary Policy Issues*, Vol. 3, 1985, pp. 9-16; and F.M. Scherer, "The Economics of Vertical Restraints," *Antitrust Law Journal*, Vol. 52, 1983, pp. 687-707.

[31] Scherer, Chapter 15, manuscript, p. 11.

Where this juxtaposition of preferences exists, vertical restraints are particularly likely to reduce consumer welfare and the efficiency in the distribution sector. The large class of inframarginal consumers, who do not value the "services," still must pay for them, although the smaller class of marginal consumers along with the manufacturer benefits from their supply. Overall, however, total surplus will decline. Note that this result holds even though output levels are increased with the imposition of the restraints. Even with increased output, we may still find lower levels of economic efficiency.

The First Economics Revised

In a recent discussion of the economics of vertical restraints, the authors observe that even the extended analysis rests on the assumption that,

> when it is not feasible for a manufacturer to write explicit ... contracts with retailers for the supply of particular services, the only alternative mechanism ... is to increase the direct return retailers receive from consumers when those services are supplied. [However, the authors proceed,] this standard economic analysis of vertical restraints is fundamentally flawed. Vertical restraints, by themselves, do not create a direct incentive for retailers to supply desired services. ... Retailers may merely take the additional money created by the vertical restraint and continue to free ride ... Such free riding entails an extra short-run profit to the retailer, and, no matter how large a margin is created by the

> vertical restraint, retailers will have no incentive to incur the added costs of supplying the desired services.[32]

As a result, vertical restraints cannot solve the free rider problem.

The conventional argument, that Klein and Murphy dispute, requires effective competition among distributors. When vertical price restraints are imposed, full-service distributors no longer fear competitive pressures from discounters, because the latter no longer have a price advantage. Without this advantage, the only alternatives for discount houses are to provide the requisite "services" and thus become more similar to their full-service rivals, or accept declining sales since fewer services are provided. In either case, distributors become more alike with the imposition of restraints.

Klein and Murphy's critique suggests the opposite result, although again, distributors become more alike. With price competition absent, they ask, why do full service distributors continue to supply the requisite services and bear the added expense? Why not dispense with the services, save the expense, and reap the difference in costs? In effect, why should not the full-service distributors become more like discount houses? While competitive pressures would not permit these results, Klein and Murphy suggest that these pressures exist only where they are readily detectable by consumers prior to purchase. On the other hand, for retailer services that can influence product quality, "such as rotation of a product with a limited shelf life,"[33] restraints alone may not solve the free rider problem. What is at issue is the extent to which competition among distributors is sufficient to induce the particular distribution services that the manufacturer wants.

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[32] Benjamin Klein and Kevin Murphy, "Vertical Restraints as Contract Enforcement Mechanisms," *Journal of Law and Economics*, Vol. XXXI, October 1988, pp. 265-266.

[33] *Ibid.*

The Klein and Murphy paper is one of a number of studies that emphasize the use of vertical restraints by manufacturers to control the actions of their distributors.[34] Where neither contractual relations between manufacturers and distributors nor competition among distributors can be relied upon, the manufacturer looks for another mechanism to secure the performance of his distributors. In effect, he wishes his dealers to provide services to consumers that, on their own, they would not find profitable to supply. The manufacturer imposes restraints to get his distributors to act apart from their economic interests.

The primary sanction, of course, is the threat of termination if the distributor does not perform according to the manufacturer's requirements. But this threat is credible only if distributors would lose a stream of valuable profits as a result.[35] To secure the performance of their distributors, higher profits are provided which can then be withdrawn if the distributor is terminated. To this end, "the manufacturer enforces minimum resale price maintenance ... and fixes the number of dealers ... [so that] a premium stream will be generated."[36]

These justifications for vertical restraints are logically distinct from those resting on the free rider problem. In this context, both price and non-price restraints may be imposed, together with limits on the number of new distributors. Even more important, these arguments require the ability of manufacturers to terminate dealers who do not perform, where performance is indicated by sales efforts or effects on product quality. In either case, consumer prices are higher, which the manufacturer encourages because of the expected effects on consumer demand.

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[34] See also Richard E. Caves, "Vertical Restraints as Integration by Contract: Evidence and Policy Implications," in Lafferty, *et al*, *op. cit.*, pp. 429-466; Patrick Rey and Jean Tirole, "The Logic of Vertical Restraints," *American Economic Review*, Vol. 76, December 1986, pp. 921-939; and G.F. Mathewson and R.A. Winter, "An Economic Theory of Vertical Restraints," *Rand Journal of Economics*, Vol. 15, Spring 1984, pp. 27-38.

[35] Depending on the level of distribution investment which is manufacturer-specific, these returns need not exceed the competitive level. See Klein and Murphy, *op. cit.*, p. 268.

[36] *Ibid.*, p. 276

While the mechanism is different, the normative appraisal of these restraints rests on the same factors as those related to the free rider problem. Are all or most consumers better off in the presence of distributors who service the product less or provide a more limited sales effort but charge a lower final price? This question does not require an all-or-nothing answer. The choice is not between having all such distributors and none of them. Moreover, in a competitive marketplace, consumers will not return to distributors who provide low-quality products or may not be attracted to distributors where the sales effort is meager. Even though manufacturers might wish to see all of their distributors perform in a certain manner, their interests are not necessarily identical with those of consumers. And consumers will benefit from a wide range of distributors providing different services and selling different quality products while setting different prices.

The normative economics here is the same as that discussed above. The mere fact that restraints may be valuable in the enforcement of private contracts is not sufficient to justify their presence from the viewpoint of public policy or consumer welfare. As before, the positive economics of vertical restraints does not lead automatically to conclusions regarding economic efficiency.

The Second Economics of Vertical Restraints

Whatever the differences in the various explanations for vertical restraints that are discussed above, they all have one critical feature in common. They all follow from the premise that the restraints are imposed by the manufacturer on his distributors. Any market power present at the distribution stage is ignored. Even though retailers might benefit from these restraints, their economic motivations play no role in these accounts.

However, the distribution sector of the economy is not so easily characterized. Questions regarding the competitive structure of this sector cannot be put aside by a simple reference to the large number of firms that coexist and the generally easy conditions of entry that are found. On the contrary, there are particular features of the distribution sector that point in the opposite direction; and these characteristics provide the foundation for a second economics of vertical restraints.

Unlike the prior explanations, this economics deals primarily with the distribution side of the manufacturer-distributor relationship. In large measure, the distribution sector exists to facilitate consumer selection among the products of rival or complementary suppliers. As a result, very few products are sold through single-line distributors where only a single manufacturer's brand is carried. And where that is the case, the distributor is often an implicit if not explicit employee of the manufacturer. Moreover, even in such circumstances, we often find distributors selling complementary products, supplied by other manufacturers, that contribute to the efficiency of the distribution process.

In most circumstances, however, the distribution sector is not a mere appendage to the manufacturing sector. Independent distributors are not readily replaced by employed sales people, and vertical integration between the two sectors is not a likely outcome if restraints are prohibited. The major reason for this conclusion is that economies of scope are pervasive throughout the distribution sector of the economy."[37] These economies occur when distribution costs are substantially lower when selling and distributing a large number of products, and also various brands of the same product, as compared with a single brand. Where these economies are important, distributors do not fear being replaced by the manufacturer's employees nor must they function according to the manufacturer's wishes. Indeed, in contrast to the characterization above, this sector may be the dominant one. Thus, it has been described that where manufacturers supply branded products but "consumers have no strong preference for one brand over several others ... the manufacturer ... is a beggar at the retailer's office."[38]

The retailer's position in the marketplace arises from his influence over the purchasing decisions of consumers. Professor Porter observes that this influence is applied in two ways: first, the retailer affects the product attributes perceived by the consumer so that "the store's reputation and image may reflect on the quality and image of the product." And second, the retailer affects consumer decisions through the supply of product information.[39] The importance of these factors turns on the consumer's selection process. It depends

> on the importance of product attributes controlled by the retailer, the perceived benefits of the range of product information disseminated by the retailer relative to the availability and cost of

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[37] See John C. Panzar and Robert D. Willig, "Economies of Scope," *American Economic Review*, Vol. 71, May 1981, pp. 268-272. Panzar and Willig identify these economies with "the existence of sharable inputs; that is, inputs which once procured for the production of one output, would also be available (either wholly or in part) to and in the production of other outputs." (p. 269) For an earlier discussion of the "horizontal scope of products" handled by distributors, see Richard B. Heflebower, "Mass Distribution: A Phase of Bilateral Oligopoly or of Competition?" *American Economic Review*, Vol. 47, May 1957, p. 278.

[38] Heflebower, *op. cit.*, p. 279.

[39] Michael E. Porter, *Interbrand Choice, Strategy, and Bilateral Market Power*, 1976, p. 21.

> other sources of information, and how large an investment in information the consumer will make.[40]

Another important factor is the physical presentation of the product in the store. Shelf space, for example, can be critical for the success of many consumer products.

Depending on the influence of such factors, the distributor can have a major effect on the shape and position of the product-specific demand curve. Furthermore, "since each retailer can withhold his selling efforts for a particular brand, and in fact influence consumers to purchase another brand, the retailing sector for a product is in a position to bargain away rents from the manufacturing stage."[41]

A similar view of the economic function of the distribution sector is contained in the works of Robert Steiner.[42] Like Porter, Steiner suggests that the role of retailers and other distributors turns on their impact on consumer decisions. In some cases, consumers pay primary attention to the manufacturer's brand, but in others, what is more important to consumers is the particular distribution outlet through which the product is sold. Thus, Steiner suggests the following "rule of thumb to determine the relative market power of retailers and manufacturers. ... If consumers are more disposed to switch brands within store than stores within brand, retailers dominate manufacturers."[43]

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[40] *Ibid.*

[41] *Ibid.*, p. 22.

[42] Robert L. Steiner, "Vertical Restraints and Economic Efficiency," Bureau of Economics, Federal Trade Commission, Working Paper No. 66, 1982; Robert L. Steiner, "Basic Relationships in Consumer Goods Industries," *Research in Marketing*, Vol. 7, 1984, pp. 165-208: and Robert L. Steiner, "The Nature of Vertical Restraints," *The Antitrust Bulletin*, Spring 1985, pp. 143-197. See also Michael Lynch, "The 'Steiner Effect': A Prediction From a Monopolistically Competitive Model Inconsistent With Any Combination of Pure Monopoly or Competition," Bureau of Economics, Federal Trade Commission, Working Paper No. 141, August 1986.

[43] Steiner, "The Nature of Vertical Restraints," p. 157.

In many market situations, distributors have great influence over consumer purchasing decisions, and in these circumstances, a substantial share of any market power present is exercised at the distribution stage. Furthermore, this type of market power is not readily dissipated by easy conditions of entry. Some measure of economies of scale together with consumers' reliance on a limited number of distributors are sufficient to ensure monopolistically competitive outcomes at the distribution stage.

This source of market power does not require collusion among rival distributors. As Steiner points out, "no such cartel is required for merchants to exercise effective upstream bargaining clout -- though a cartel obviously enhances the leverage."[44] This point is important because many have argued that effective cartels are essential for market power at the distribution stage. In fact, following the analysis of both Porter and Steiner, a more relevant consideration is the distributor's impact on consumer decisions.[45]

This view of the distribution sector stands in sharp contrast to that which underlies the earlier discussions. Indeed, the most substantive difference between the first economics and the second economics of vertical restraints is the very different perception of the distribution sector. The earlier conclusions assume a distribution sector that is effectively competitive. They do not follow when the actual structure of the distribution sector is taken into account.

In this regard, there is an inconsistency in some of the arguments which underlie the first economics of vertical restraints. As noted above, the extended version of the free rider problem emphasizes the role of distributors in certifying the style or quality levels of the products they distribute. The argument is made that these efforts are free ridable and that restraints are needed to correct the allocative implications of this problem. However, this certification function is *inconsistent* with the assumption of atomistic competition at the retail level. Indeed, functions akin to this certification feature underlie the Porter-Steiner perception of the economic role of full-line distributors. Where this certification feature is important to many consumers, the particular distributors face downward-sloping demand curves and achieve some level of monopoly power. In these circumstances, one cannot assume atomistic competition at the distribution stage.

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[44] *Ibid.*

[45] Another writer who offers a comparable view of the distribution sector is Palamountain. See Joseph Palamountain, *The Politics of Distribution*, 1955, pp. 24-57.

An early discussion of vertical restraints that is consistent with this view of the distribution sector is contained in two articles by Bowman.[46] He argues that vertical restraints are found only when there is substantial market power at both the manufacturing and distribution stages. His analysis is thereby similar to the Porter-Steiner view.[47]

Whether because of their function of certifying style or quality levels, or for the other reasons suggested by Porter or Steiner, large distributors may achieve a substantial of measure of monopsony power in regard to their suppliers.[48] One means to exercise this power is to require supplying manufacturers to enforce vertical restraints on all who distribute their products. Certainly, in many circumstances, retailers "encourage" manufacturers to impose these restraints. And supplying manufacturers will agree to this request as long as increased sales of their products that are made by major distributors exceed those lost through other outlets as distribution margins increase.

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[46] Ward S. Bowman, "Resale Price Maintenance -- A Monopoly Problem," *Journal of Business*, Vol. XXV, July 1952, pp. 141-155; and Ward S. Bowman, "The Prerequisites and Effects of Resale Price Maintenance," *University of Chicago Law Review*, Vol. 22, 1955, pp. 825-873.

[47] Porter acknowledges this similarity. See Porter, *op. cit.*, p. 16.

[48] This discussion is taken from William S. Comanor, "Vertical Arrangements and Antitrust Analysis," *New York University Law Review*, Vol. 62, November 1987, pp. 1158-1159.

The question remains, however, why these distributors should be concerned with the prices charged by other outlets if their position in the marketplace really provides substantial market power. The answer requires a market position where cross-elasticities of demand are neither zero nor infinite. Distributors in these circumstances will recognize that, while many customers will remain with them regardless of price differences, others will not and will purchase from rival outlets if a substantial price difference exists. So long as there are a limited number of manufacturers with sufficient capacity to supply the market, or who have the requisite measure of brand recognition, distributors will seek to limit the availability of comparable products offered by rivals at lower prices. One means to this end is to secure the enforcement of resale price maintenance or other such restraints by their supplying manufacturers. If this can be done, there is an important incentive for vertical restraints, although it requires some degree of market power at both stages of production.

The imposition of vertical restraints when distributors are exercising monopsony power imposes efficiency costs rather than gains. The distribution margins secured through these restraints could be much higher than those required for any remaining free rider problems. Even if such problems were present, and there was an incentive for manufacturers to impose vertical restraints, this factor need not be the only one at work, nor need it be primarily responsible for the inflated distribution margins that result.

There remains the inherent problem with vertical restraints that all distributors sell at the same higher price. Consumers have no choice between high-priced, high quality-conscious outlets and low-price, less imposing distribution facilities. Final prices are unaffected by the character of distribution.

Furthermore, the imposition of these restraints restricts output as well as leads to increased prices. In this respect, they are analogous to horizontal restraints which have the same economic consequences. They arise from the exercise of market power at the distribution stage, which may or may not be buttressed by the presence of a cartel. In either case, they lead to a less efficient distribution sector.

Conclusions for Antitrust Policy

As the discussion above indicates, there are two economics of vertical restraints, with very different implications for antitrust policy. A critical issue is how to choose between them. The first economics implies that output is increased while the second suggests that output is reduced. So to discriminate, Easterbrook suggests that economists should "look at output changes in the short run."[49] However, with both explanations, consumer prices are higher, at least in the short run.

At this point, there are only two studies that provide empirical evidence on this question: whether vertical restraints have the effect of increasing or reducing output levels. The first deals with an entire industry while the second examines data for a single firm and its many distributors. The former concerns the liquor industry and provides empirical evidence that resale price maintenance led to output restrictions.[50]

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[49] Easterbrook, *op. cit.*, p. 154

[50] Stanley I. Ornstein and Dominique M. Hanssens, "Resale Price Maintenance: Output Increasing or Restricting? The Case of Distilled Spirits in the United States," *Journal of Industrial Economics*, Vol. XXXVI, September 1987, pp. 1-18.

And the latter study reaches the same conclusion for Sealy mattresses.[51] The authors conclude that "by eliminating competition among Sealy licensees the territorial restraints reduced output and increased prices. ... The removal of territorial restraints saved consumers buying Sealy brand mattresses during 1981-1985 about $500 million."[52] Both studies are thereby consistent with the second economics of vertical restraints.

To be sure, these two studies do not prove the general rule. It is possible that other empirical studies could point in the opposite direction. However, the implications of output changes for economic efficiency are not symmetrical. Although lower output levels indicate reduced consumer welfare, increased output has ambiguous normative results. Despite the presumptions of Easterbrook and Bork that increased output is pro-competitive, that conclusion need not be so, and indeed may not generally be the case. Increased output is consistent with reduced consumer welfare.

Still, one could conclude from this discussion that there is no general result -- that these restraints are sometimes welfare enhancing and sometimes welfare reducing. While some might suggest that specific restraints be adjudicated under the Rule of Reason, there are other factors which are controlling. First and foremost is the observed result that the rule applied has major implications for how individual cases are decided. Thus, in discussing the different rules currently used for price and non-price restraints, Professor Liebler declares: "since plaintiffs win all *per se* cases and defendants prevail in virtually all cases under the Rule of Reason, the distinction between price and non-price restraints becomes crucial."[53] The choice between adjudicative rules is critical for the direction of antitrust policy towards vertical restraints.

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[51] Willard F. Mueller and Frederick E. Geithman, "An Empirical Test of the Free Rider and Market Power Hypotheses," April 12, 1989, University of Wisconsin, unpublished manuscript.

[52] *Ibid.*, p. 19.

In this context, there is a substantial difference between the Rule of Reason and a rule that vertical restraints are *per se* violations even though specific exceptions are permitted. Thus, to justify a *per se* rule, one need not require that these restraints are always and in every case anti-competitive. As Dean Pitofsky writes,

> the justification for a *per se* approach is that minimum price fixing is often a response to dealer pressure, detecting that fact is extremely difficult, the effects at the dealer level (and occasionally the manufacturer level) are highly anti-competitive, and the purported business justifications of those arrangements can usually, if not always, be achieved in some less restrictive way.[54]

Despite the arguments offered by those who support the first economics of vertical restraints, their position rests on weak analytical grounds. The underlying assumption of atomistic competition at the distribution stage hardly purports with reality and yet is commonly made. Its purpose is to justify an account that pays little attention to distributors' gains from these restraints and also presumes that distributors can be required to supply "services" or undertake other functions that do not serve their best interests. With a more realistic view of market conditions in distribution, a very different picture emerges; and it is one that is less hospitable to the imposition of vertical restraints. The second economics of vertical restraints provides a more valid account, and appropriate antitrust standards should follow in its wake.

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[53] Wesley J. Liebler, "Resale Price Maintenance and Consumer Welfare: *Business Electronics Corp. v. Sharp Electronics Corp.*", UCLA Law Review, forthcoming, p. 5.

[54] Pitofsky, *op. cit.*, p. 1495.

When vertical restraints arise primarily from conditions at the distribution stage, their economic motivations and effects are the same as strictly horizontal forms of price fixing and market division arrangements. For antitrust policy to tolerate such restraints is to reverse long established standards. Legislation that resale price maintenance is *per se* unlawful is needed to reaffirm our recognition of the economic benefits of price competition at the retail level.

Mr. **Zimmerman**. IMRA believes it should be the economic policy and the law of the land that price-fixing conspiracies are illegal. I really can't imagine anyone seriously quarreling with that proposition, although there have been some federal antitrust officials who would have permitted some price-fixing arguments.

Their views are, at best, misguided and, at worse, very dangerous.

As Senator Thurmond said, if we start with a general agreement that price-fixing is wrong, it seems to me that much of the debate surrounds two issues. One, what is price-fixing and, two, what evidence is necessary to prove it.

During the Depression, Congress created an antitrust exemption for so-called State fair trade laws which, with the State's approval, manufacturers could dictate legally the resale prices of products.

In 1975, by an overwhelming bipartisan majority, Congress passed the Consumer Goods Pricing Act which eliminated State fair trade laws. I think that the evidence that was gathered in connection with the repeal of the fair trade laws bears repeating here.

Fixed resale prices injure customers, hurt small business, lead to increased business failure, and absolutely do nothing to help American competitiveness. For example, extensive economic analysis conducted by the Department of Justice and other economic estimates conclusively demonstrated that consumer prices set by the manufacturers in fair trade States averaged 19 to 27 percent higher than consumer prices in States which did not have retail price-fixing.

In our own catalogs, we used to sell a particular TV for $399, with an asterisk behind it that said in the States of Tennessee, Texas and Ohio you have to pay $499 because of fair trade.

It was estimated that fair trade cost customers $6.5 billion a year in 1975 dollars. A more recent study in 1982 funded by the FTC shows that aggressive FTC action against RPM by the Levi Strauss Company saved customers $72 million.

With this strong evidentiary record, we are being propelled backwards in time by *Monsanto* and *Sharp* to the days of fair trade. Within hours after the *Sharp* decisions, suppliers called our buyers in regard to raising our prices on our merchandise that we were selling.

Both historical experience and common sense tells us that American customers and the American economy suffer when manufacturers are free to fix retail prices. Our Nation's system of distribution has for many years been based on the proposition that retailers know what prices customers will pay.

Having bought and paid for the goods, the independent retailer is in a better position than the often-distant supplier to determine what customers in any marketplace want and what they are willing to pay.

Manufacturers have a great deal of freedom to pursue their perfectly legitimate needs on subjects as diverse as warranty, repair, product explanation, or even promotion. But we think that this committee ought to condemn intrusions by manufacturers into pricing freedoms.

Even more important, the ultimate decision should be left up to the customers. Customers tell us how to price our merchandise, just as they tell us how to do everything else in our stores—what hours to open, what services they want, and even what items we should carry. If they don't like what we have got, they go elsewhere.

Only a short-sighted retailer would fail to provide necessary services desired by their customers and needed by them in their purchases.

Some theorists argue that RPM is needed to prevent free-riding; that is, the diversion of sales at higher prices from retailers who provide services to retailers who do not service but sell products at a lower price.

Our showroom sales staff, return policies, advertising, and decor are equal or superior to our higher-priced competition. We do all this, while we still provide service at a competitive price. What could possibly be wrong with a rule of law which permitted us to continue to do this?

Moreover, the exhibits we have submitted today show that manufacturers are clearly seeking to fix resale prices, not to prevent free-riding. They don't demand service; they only ask for fixed prices.

The real issue is not just a debate between suppliers and retailers on proper policy. Rather, the true question for Congress is what rule of law will be best for American consumers and the economy.

I am not a lawyer, but I have spent enough time on this bill to have a general idea of what it does and what it does not do. First, it does not prohibit unilateral activity. Rather, it goes out of the way to emphasize that it is applicable only to conspiracies. There must be an agreement.

Second, it does not address in any way lawful restrictions imposed by a manufacturer on a retailer in the distribution of products. It only addresses a single issue. It condemns conspiracies to fix retail prices.

Do not be misled by the exaggerations of some opponents of this bill. The bill does not restrict previously lawful business conduct. It does not harm consumers and does not open the door to frivolousness. Instead, it is a very measured and modest response to a very real problem caused by the Supreme Court's misunderstanding or disagreement with congressional policy.

There is little real debate on the question of whether or not retail price-fixing should be illegal. It should. Rather, the debate is on what price-fixing is and how you prove it. In my opinion, this bill clarifies these points.

In the definition of price-fixing, it states retail price maintenance exists when a complaining retailer and manufacturer agree to eliminate another retailer whose prices they consider to be low.

Senator **METZENBAUM**. Mr. Zimmerman, I am going to have to cut you off.

Mr. **ZIMMERMAN**. I am sorry, Senator. Thank you very much and we appreciate it.

Senator **METZENBAUM**. Thank you.

[Prepared statement with attachments follow:]

Statement of

RAYMOND ZIMMERMAN
Service Merchandise Company
Nashville, Tennessee

on

Behalf of

INTERNATIONAL MASS RETAIL ASSOCIATION

In

Support

Of

S.865

Consumer Protection Against Price-Fixing Act

Of 1989

Before the Antitrust Subcommittee of
The Senate Judiciary Committee

June 1, 1989

Mr. Chairman and Members of the Committee. Thank you for allowing me to appear today to support S. 865, the Consumer Protection Against Price Fixing Act of 1989. I come here on behalf of the International Mass Retail Association ("IMRA"), the trade association of discount retailers.

IMRA represents over 100 major discount retail chains doing business in all 50 states and whose sales represent an overwhelming majority of the $130 billion a year discount retail industry. IMRA members collectively operate over 25,000 stores, provide jobs for well over a million Americans, and sell tens of thousands of products.

We are united by many common interests, but none is more important to us than the right to sell products at prices which are competitive and are not fixed. The discount retail industry owes its success, and its survival, to price competition. Retailers must not be forced to charge fixed, artificially high, resale prices. When we are subject to such price-fixing dictates, our customers are the ultimate victims -- victims of artificially inflated prices, set high in order to force consumers to pay more than they should to businesses which are afraid to compete. Our industry wants to offer discounts and good service to the American public. That is our livelihood.

That is what Congress wants. That is what this legislation is about.

We have heard objections from certain sectors of the supplier industry about this bill. They don't like it. They are afraid of it. They appear to be afraid of competition. But the rhetoric we hear from them has reached truly ridiculous levels. For example, the Senators on this Committee have been told that passage of this bill will in fact *hurt* consumers and will *decrease* discounting. This is completely wrong. The fundamental flaw behind their arguments is the notion that manufacturers, and *only* manufacturers, know what is best for consumers. That presumption needs to be addressed head-on: Who best determines what price a retailer should charge a consumer? The consumer and the retailer who strike the marketplace bargain or the manufacturer, distant from the transaction? If you believe in consumers' sovereignty, then you should enact this bill. Consumers want discount prices; this legislation permits discounters to discount without fear of termination by manufacturers acting in concert with high-priced retailers.

In the last decade, our association has offered testimony before this Committee and others in Congress on over a dozen occasions. At the beginning of the decade IMRA, then known as the National Mass Retailing Institute, appeared here to challenge the efforts of William Baxter and James Miller, respectively the former heads of the Antitrust Division and the Federal Trade Commission, to dismantle the antitrust laws in the area of resale price maintenance. Members of this Committee no doubt remember that those former antitrust officials disagreed with the longstanding rule of law that resale price maintenance is illegal per se -- that is, in all instances -- under the antitrust laws. Had Messrs. Baxter and Miller had their way, resale price maintenance would not only have been freed from the per se illegality rule, it would -- in practical effect -- have been legal in all cases. Messrs. Baxter and Miller, claiming to champion the right of manufacturers to be freed from antitrust restraints, would have given manufacturers and high-priced retailers the express right to conspire to prevent price-cutting on brand-name products.

Fortunately, this Committee and Congress intervened and stopped Messrs. Baxter and Miller in their tracks. Indeed, on the eve of a Supreme Court argument in an important antitrust case, the Monsanto case, Congress enacted legislation, signed by the President, which prevented Mr. Baxter from arguing to the Supreme Court that the per se rule should be abandoned. That accomplishment is a great credit to this Committee for which our industry, and no doubt the consuming public, are thankful.

Unfortunately, however, Messrs. Baxter and Miller and their followers have left a legacy. Their seeds of antitrust revisionism have sprouted and we are finding, in the Supreme Court and in many lower court opinions, less respect for the rule of law that resale price maintenance is illegal per se. Many Federal Judges, while reluctant to abdicate the per se rule entirely, have nonetheless nibbled away at the doctrine, so much so that it takes enormous effort, substantial resources, and great luck to prove a resale price-fixing conspiracy. The misdirection started by Messrs. Baxter and Miller and other antitrust revisionists is most pronounced in two recent Supreme Court cases, the Monsanto case and the Sharp case -- opinions which have prompted the important legislation under consideration today.

Let me briefly recount what I view as the practical significance of the cases. In Monsanto, the Supreme Court said that evidence that (a) a high-priced retailer complained to a manufacturer about a discounter's prices and (b) the manufacturer terminated the discounter as a dealer of the product "in response to" the competing retailer's complaint together were still not enough evidence to submit a price-fixing conspiracy case to a jury. Rather, without giving much specific guidance, the court said that "something more" was required, something which would indicate that the manufacturer and the complaining dealer had an agreement to terminate the low-price retailer. "Something more" must tend to indicate that the manufacturer was not acting alone in making the decision to get rid of the discounter.

I think that the primary fault of the Monsanto opinion is the Supreme Court's failure to recognize the practicalities of distribution. The court seemed to want a neat and tidy semantic solution to a real-world problem that is characterized by inferences, insinuations, implied threats, and guile. Lower court opinions, purporting to follow Monsanto, have in fact adopted all too rigid a standard of the "something more" that is required to prove a price-fixing conspiracy.

One case, for example, is illustrative: in the James Jeans case, a jury found that plaintiff had been terminated as a dealer of product because of a competitor's complaints and further found that the competitor and the jeans supplier in fact had reached an agreement to terminate the discounter. This was a classic resale price maintenance conspiracy -- a low-price, competitive retailer was cut off, not because of any failure to offer good service or to pay its bills or to do any of the many reasonable things a manufacturer could require of it. No, in this case the plaintiff was cut off as a seller because a competitor could not stand the heat -- it did not like the price competition and asked the manufacturer to do something about it. According to the jury, the manufacturer agreed. However, the Ninth Circuit felt obliged to follow what it understood the Supreme Court language in the Monsanto and Sharp cases to be. It ruled that the "something more" was not found in that case. There was direct testimony in that case that the manufacturer told the complaining retailer: "Don't worry . . . I'll take care of things." That, according to the Court, did not satisfy the "something more" test of Monsanto. A plaintiff must now "disprove a negative" . . . that is, must identify all of the supplier's possible reasons for termination and then disprove all of them.

Monsanto, in short, was a troubling opinion. In my view, however, the Supreme Court's ruling in the Sharp case dealt an even more serious blow to the discount retail industry and to the consumers of America than did the Monsanto opinion. In fact, the Sharp opinion is nothing short of astonishing. The court there held that even if a terminated dealer proves that there is an agreement to eliminate price competition -- a conspiracy, a combination, or a contract, call it what you will -- that is not enough. The fact that the manufacturer and the high-priced retailer agreed to get rid of a discounter -- simply because it was discounting -- is not "price-fixing", according to the Court. Rather, the Supreme Court has added the obligation that, to prove an illegal resale price-fixing case, there must be an agreement which sets prices at some specific level.

This is really an incredible opinion. The Court has held that if two companies agree that a third company should be taken out of the market because of its low prices -- thereby freeing the complaining retailer of the obligation to compete on prices -- that is not tantamount to price-fixing. I cannot fathom that logic. Is there really a difference to the consumer if the agreement is "Get rid of Service Merchandise, they are a discounter" as opposed to "Get rid of Service Merchandise, they do not sell at the suggested list price"? To me, those agreements are one and the same. Indeed, if the rule adopted in Sharp were ever applied in so-called "horizontal" price-fixing cases, there would be few successful price-fixing prosecutions -- price-fixing conspiracies are as often marked by a simple agreement not to compete on price as they are by an agreement on a particular price.

Together, the Monsanto and Sharp opinions were devastating blows to the discount retail industry and to our price-conscious consumers. They have encouraged suppliers to stop us from discounting or penalize us for discounting; they have encouraged the FTC and suppliers to change radically the practices on advertising of discount prices, and they have encouraged high-priced retailers to complain about competition -- and to get results when they do so. Finally, they have contributed to the overall demise of private antitrust enforcement in the U.S. It used to be said that private plaintiffs were like private attorneys-general -- they were important in our nation's assault on anti-competitive practices. If, as a practical matter, private antitrust enforcement becomes impossible, there will be much less deterence for antitrust violators.

Some statistics from the Administrative Office of the U.S. Courts emphasize this point. The attached chart shows private antitrust cases filed over the last fifteen years:

YEAR	CASES
1974	1230
1975	1375
1976	1504
1977	1611
1978	1435
1979	1234
1980	1457
1981	1292
1982	1037
1983	1192
1984	1100
1985	1052
1986	838
1987	758
1988	654

From 1977 to 1988, we saw a drop off of about 60% in private cases filed. The Sharp and Monsanto opinions, in my judgment, have accelerated that trend. Private attorneys-general are not challenging anti-competitive conduct; that conduct, left unchallenged, is on the increase.

Let me illustrate with a few examples drawn from a recent survey conducted by our trade association. I hasten to add that the survey was conducted on a confidential basis because of the obvious need to protect our members from retaliation by suppliers. The data was not made available to any of the participants or any individual members of this association. What I report here is a compilation of the survey results done by an outside law firm. Dozens of discount retailers responded to our request for information.

Not surprisingly, the survey shows that the issue of resale price maintenance is viewed by virtually every one as "extremely important" to our industry. Also, not surprisingly, our members unanimously agree that resale price maintenance, and the termination of discounters simply because of their pricing practices, will injure competition, will reduce the supply of product to consumers, will make our industry less competitive and will hurt consumers. These conclusions may not be news to this Committee, but we urge you to take them seriously. To state the obvious: this is a critical issue for our industry.

Our survey also tells us that *Monsanto* and *Sharp* have had, and continue to have, a significant impact in the distribution of products. One-third of our respondents indicate that, within the last two years, some of their suppliers have communicated with them on changes in the legal rules concerning a supplier's ability to control retail prices, indicating that the law had changed in the supplier's favor. Over one-half of our respondents tell us that suppliers are admitting that other retailers are complaining about discounters' prices. Of such respondents, more than one-half indicate that such complaints have increased since 1986. Of our respondents, 60% tell us that suppliers have stated, or at least implied, that they would not provide product to discounters because of their discount pricing. Again, of those retailers which have received such statements from suppliers, well over half indicate that such statements have increased since 1986.

Fully one-fifth of our responding members indicate that suppliers have taken punitive actions against them because of their discount practices, with such actions on the increase since 1986. Well over half of our members tell us that suppliers are making no secret of their desire that retailers should sell at suggested resale prices -- with such suggestions again on the increase since 1986. Examples include the Mountain Safety Research, Kelty, Therm-a-Rest, and Swarovski pricing policy standards which I attach to this testimony as Attachment A. These suppliers state that they will not make products available unless they are resold at a minimum, fixed price. The recent successful antitrust prosecutions by states, notably Maryland and New York, against Panasonic and Minolta demonstrate this point -- suppliers are encouraged by Sharp and Monsanto to fix prices. The Panasonic case, fortunately, shows that states can sometimes arrest the problem -- and return $16 million to overcharged customers.

Most recently, as this Committee may know, the Federal Trade Commission has relaxed certain guidelines it has had in place on cooperative advertising programs. This FTC action, we believe, was prompted by the relaxation in the rules governing resale price maintenance, notably in the Sharp and Monsanto cases. That is, the Supreme Court, in reducing the cases traditionally thought of as conspiracies, is necessarily expanding the category of conduct called unilateral or Colgate conduct. Some cooperative advertising is necessarily concerted action -- the very name of the program -- "cooperative" -- suggests that it is not unilateral conduct. Nonetheless, the FTC, taking a clue from the Supreme Court, has declared such programs to be protected unilateral conduct. And, under Sharp, high-priced retailers may freely police a manufacturer's resale price policies without fear of legal retribution.

It had been the rule at the Federal Trade Commission, a rule followed by most suppliers, that cooperative advertising dollars could not be conditioned on a retailers' agreement that it would not use the cooperative advertising dollars to advertise a discount price. Cooperative advertising programs, and similar promotional programs, are extremely important to retailers, as they represent supplier-provided compensation for expenses otherwise incurred by the retailer. In the discount retail industry, where profit margins hover around two percent, cooperative advertising money is essential. Discount retailers, according to our survey, have noticed a substantial increase in cooperative advertising programs which include the condition that the money not be used to advertise a price below the suggested resale price. According to our survey, several companies have been particularly interested in fashioning cooperative advertising and other sales programs and policies that forbid, or at least strongly discourage, the advertisement of discount retail prices. Such programs clearly benefit high-priced retailers which do not wish to compete on price.

For example, I attach to this statement (as Attachment B) the recent cooperative advertising policies of eight separate companies: Reebok, Champion, Connelly Skis, Foot-Joy, Nike, Nikon, RCA and Commodore Computer. While the suppliers are careful to state that retailers are free to price as they see fit, they condemn outright the use of cooperative advertising money to advertise high discounts. Indeed, in the Foot-Joy program, it forbids any advertising of deep discount prices, whether paid for by cooperative advertising dollars or not. In practice, then, these policies set the resale prices of products. And, as was predicted in the testimony on the Consumer Goods Pricing Act, they seem to facilitate horizontal conduct as well.

Please study the Reebok and Champion statements in particular -- a side-by-side comparison shows that these companies have adopted word-for-word identical programs, including the same 20% off suggested price limit, on advertising prices.

What the IMRA survey tells me, Mr. Chairman, is that the relaxation in the rules surrounding resale price maintenance has had a definite market impact. Our survey is, I suspect, just the tip of the iceberg. We have hardly canvassed the thousands of small retailers throughout the United States. I have every reason to believe that all resellers of products have felt the renewed pressure to keep prices high. We are, I fear, returning to the days of the late, and not lamented, mis-named "Fair Trade," where, with the state's approval, manufacturers could dictate the resale prices of products without fear of legal repercussion. This is, I submit, extremely bad policy.

I do not need to recite the well-developed economic record on the pernicious effects of "Fair Trade" laws. This Committee, in 1975, thoroughly examined that topic, reviewing extensive economic analyses done by the Justice Department, economists, the Library of Congress, and industry officials. Congress concluded that Fair Trade increased inflation, facilitated price-fixing by manufacturers, retarded the growth of more efficient forms of retailing, added substantial and unnecessary costs to distribution, and was not necessary to accomplish any desired social end. The evidence introduced during those hearings was compelling, including surveys done by the Antitrust Division which showed that resale prices set by manufacturers in "Fair Trade" states were often 19% - 27% higher than resale prices in states where prices were "free". Another study estimated that "Fair Trade" cost consumers $6.5 billion a year -- that was in 1975 dollars.

More recently, a 1982 study funded by the FTC showed that aggressive FTC action against resale price maintenance by Levi Strauss saved consumers about $72 million per year -- that in jeans sold by one supplier! Nonetheless, despite this strong evidentiary record compiled over many years and the resultant Congressional repeal of "Fair Trade" in the Consumers Goods Pricing Act of 1975, the _Sharp_ and _Monsanto_ opinions are propelling us _backwards_ in time. We do not want to return to the days of "Fair Trade" where if a manufacturer opted for high prices, all discounts were illegal. We do not want to return to an era where manufacturers, through legally-permitted terminations of retailers simply because they are discounters, through cooperative advertising programs which ban advertising discount prices, and through other tactics, can eliminate resale price competition from the market. History has taught us that this direction is unsound. Higher resale prices hurt America's economy and America's consumers.

This legislation at hand is urgently needed by my industry and by consumers. The legislation is aimed as much at stopping the further erosion of the *per se* rule as it is to reclaim lost ground. Indeed, as I read the legislation, this bill does not even restore us to the state of the law prior to the *Monsanto* opinion. Rather, it seems to me to codify *Monsanto* by mandating that there be a causal connection between a competitor's price complaint and a manufacturer's decision to terminate. That is precisely what *Monsanto* required -- a clear evidentiary basis for concluding that there was a conspiracy.

This bill hardly prevents a manufacturer from adopting a minimum resale price policy and enforcing it, *unilaterally*. Nor does it prevent a manufacturer from terminating a discount retailer "in response to" a price complaint if the price complaint is not the substantial contributing cause for the termination -- put another way, if there is no agreement to do so. As I read the first section of the bill, then, it is meant *only* to tell Federal district court judges that the *per se* rule is alive and well, if and when a retailer can show a termination that was *caused* by a conspiracy to fix or maintain resale prices. I do not think that is such alarming legislation; indeed, it is a very modest response to a very serious problem.

I could, in fact, argue for a far more strenuous bill, one that would restore the pre-*Monsanto* standard and permit a resale price maintenance conspiracy case to get to the jury if there was evidence of a dealer complaint *followed* by termination by the manufacturer of the discount retailer. But that is not what this legislation calls for -- it requires far more evidence just to get to a jury.

In my view, the second part of this legislation is far more important, because it relegates *Sharp* to the scrap heap of ill-advised antitrust decisions. This section is essential in re-educating our judiciary on what Congress views price-fixing to be. If a high-priced retailer and manufacturer have an agreement to terminate a discounter simply because it is a discounter, that necessarily implies that the discounter's prices are below some desired level. We should not require a plaintiff to prove with precision what that level is -- it should be enough to require proof of an agreement and the reason for the termination -- low, discount prices. I cannot overstate to this Committee the importance of the *Sharp* provision of this bill. If it is not enacted, high-priced retailers and suppliers will be free to conspire at will to eliminate discounters simply because they are discounters. A plaintiff, under Sharp, will never be able to prove that such conduct is an antitrust violation unless the plaintiff also proves some agreement on resale prices or specific price levels. That is too high a burden of proof, one not rooted in any kind of economic rationale or public policy wisdom.

Mr. Chairman, resale price maintenance is destructive and anti-competitive. It needlessly takes from consumers their hard-earned money. Conspiracies to eliminate discounting and discounters are price-fixing -- it is that simple. This Committee, and Congress, have time-and-time again made the public policy determination that we want competitive prices, both interbrand and intrabrand. We must now stand together to reject the dangerous and destructive doctrine that "a little price-fixing is all right." If allowed to flourish, this anti-competitive philosophy will continue to choke off competition and will end competitive pricing in the retailing of many consumer goods. I have heard it said repeatedly that antiquated antitrust jurisprudence is a primary reason for the loss of U.S. competitiveness in foreign markets. Could the opposite in fact be true? By relaxing antitrust laws, do we in fact invite foreign competitors like Minolta and Panasonic to come to our country and price fix? The abatement of private cases and relaxation of antitrust laws, I submit, hurts the U.S. consumer and the U.S. economy. Please help competition and consumers by enacting this legislation. This bill is a measured, justified solution to a real problem.

ATTACHMENT A

Mountain Safety Research
P.O. Box 3978
Terminal Station
Seattle, WA 98124 USA

1222 1st Avenue South
Seattle, WA 98134
(206) 624-8573

MSR 1987 WHOLESALE AND SUGGESTED MINIMUM RETAIL PRICE LIST

Stoves & Accessories

Item #	Description	Wholesale	Suggested Minimum Retail
311007	X-GK Stove (with pump)	$50.97	$79.95
311008	X-GK Stove (without pump)	44.97	69.95
311001	Firefly Stove (with pump)	38.97	59.95
311002	Firefly Stove (without pump)	32.97	49.95
311400	WhisperLite Stove (with pump)	25.17	41.95
311401	WhisperLite Stove (without pump)	19.17	31.95
218504	Pump Assembly*	15.57	25.95
324009	X-GK Maintenance Kit	4.77	7.95
324430	WhisperLite Maintenance Kit	4.17	6.95
323010	X-GK Stove Bag	4.17	6.95
323005	Firefly/WhisperLite Stove Bag	2.97	4.95
319421	X-GK/WhisperLite Windscreen and Heat Reflector System	4.17	6.95

Stove Parts

Item #	Description	Wholesale	Suggested Minimum Retail
219791	Jet and Cable Tool	$ .89	$1.49
119120	Aluminum Cup	2.37	3.95
119121	1 oz. Plastic Bottle	.89	1.49
119097	Elbow Retaining Pin	.90	1.50
219222	X-GK Stove Base	1.19	1.99
219220	Fibertrax Priming Pad	.17	.29
219224	X-GK Enclosure Assembly	4.50	7.50
219228	Pumwire Assembly	.34	.59
219249	X-GK Cable	4.49	7.50
2192491	G/K Cable	4.49	7.50
219425	WhisperLite Cable	2.70	4.50
219221	Flamespreader	.77	1.29
219250	X-G Jet Assembly	1.40	2.35
219251	XK Jet Assembly	1.40	2.35
219215	G Jet Assembly	1.40	2.35
219219	K Jet Assembly	1.40	2.35
219422	WhisperLite Jet Assembly	1.40	2.35
219227	Sparker Assembly	2.97	4.95
129256	Sparker Spring	.29	.48
129173	Sparker Flints (pkg. of 6)	.17	.29
129171	Jet Cleaning Wire	.48	.79
119257	Surge Dampers (pkg. of 4)	1.55	2.59
119102	Firefly Set Screw	.35	.59
119156	Retainer Rings	.06	.10
119230	Catch Arm	.59	.99
324012	GK Maintenance Kit	4.77	7.95
324013	MF/9A Maintenance Kit	3.57	5.95
324000	Firefly Maintenance Kit	4.17	6.95
119300	Firefly Windscreen	3.57	5.95
225004	Firefly Suspension Kit	7.17	11.95
324010	Dealer Service Kit (for GK & X-GK Stoves)	29.87	
324537	Dealer Service Kit WhisperLite	29.87	

All Prices Subject to Change Without Notice.

*For a complete listing of pump parts please contact MSR Customer Service

"Mountain Safety Research will discontinue sales of all its goods to any dealer whom it learns has engaged in a sale of Mountain Safety Research (MSR) products below suggested minimum retail prices. This policy does not apply to short (maximum of 7 days), periodic sales or promotions. This policy applies to first quality goods and not seconds or distressed merchandise. This policy is effective August 15, 1986."

Fuel Bottle

Item #	Description	Wholesale	Suggested Minimum Retail
323017	Red Fuel Bottle		
323018	Silver Fuel Bottle		
	1 to 139 Fuel Bottles (per color) ea.	$3.58	$5.49
	Multiples of 140 (per color) ea.	3.27	5.49
129130	Fuel Bottle Cap (with "O" ring)	.59	.99
118133	Fuel Bottle "O" Ring	.19	.25

Lithium Batteries

Item #	Description	Wholesale	Suggested Minimum Retail
391033	Lithium D Cell	$13.17	$21.95
391031	Lithium C Cell	11.37	18.95
391034	Dummy D Cell	.72	1.20
391032	Dummy C Cell	.72	1.20

Bicycle Products

Item #	Description	Wholesale	Suggested Minimum Retail
341536	Bicycle Helmet S/M — M/L	$22.00	$36.95
349512	Helmuffs 1–12	5.97 ea.	9.95
	12 plus	4.97 ea.	9.95
	Quick Discs		
349514	Front Wheel		
349515	Rear Wheel		
	1–6 Single Wheel Sets	$27.47 ea.	49.95
	7 or more sets	26.10 ea.	49.95
	1–3 Complete Bike sets	54.94 ea.	99.90
	4 or more Complete Bike Sets	52.20 ea.	99.90

Product Repairs

Please consult our Repairs price list for information.

MSR Wholesale Terms and Conditions 1987

Effective January 1, 1987, the terms and conditions governing wholesale transactions with MSR will be as follows:

- Our standard terms are net 30 days from date of invoice for accounts with approved credit. All orders are subject to credit approval. Orders will not be shipped if an account is past due. A finance charge of 1.5% per month will be charged each month until past due balances are paid in full. ($5.00 minimum charge)
- MSR will not accept wholesale orders for less than $25.00 in value. Orders to be shipped on open account will be a minimum of $100.00; those orders of less than $100.00 will be shipped either COD or CIA.
- Prices are subject to change without notice.
- Shipments are F.O.B. our plant, Seattle, WA. Customer assumes risk of damage or loss from F.O.B. point.
- A 15% restocking charge will be assessed for refused shipments and for new merchandise approved for return. Approval for all returns must be obtained from MSR in writing in advance, and all freight charges must be prepaid by the dealer.
- Buyer agrees to pay all costs of collection or litigation associated with past due accounts, including attorney's fees and court costs.
- These terms and conditions supersede any agreement, waivers, obligations or representatives except those made in writing by a duly authorized officer of Mountain Safety Research.
- Any purchase order or buyers' terms, policy or conditions are not agreed to if they are in conflict with the Wholesale Terms and Conditions stated above.
- These are the terms and conditions of sale and in no way obligate MSR to conduct a transaction.

KELTY

CUSTOMER SERVICE & ORDER DEPT.: 500 N. Industrial Road, St. George, Utah 84770
(800) 423-2320 (801) 673-4612

GENERAL OFFICES: P.O. Box 7048-A, St. Louis, Missouri 63177 (314) 576-8005

1989 TERMS AND CONDITIONS

EFFECTIVE 8/1/88

All orders are subject to acceptance by Kelty, St. George, Utah.

PRESEASON TERMS

1. All spring preseason orders received by October 31, 1988 for delivery between January 1, 1989 and May 31, 1989 at $1,000 minimum per shipment per location will receive 2% 60 days with FFA (full freight allowance). Orders written at the Outdoor Retailer Show (or your Regional Rep Show) will receive 4% 60 days, FFA. Add 2% additional discount by ordering a minimum of 20% of your order in each of two major categories (packs, tents, sleeping bags). Add 2% additional discount by ordering a minimum of 15% of your order in each of the three major categories. The maximum 8% discount can be achieved by ordering at the Outdoor Retailer Show (Regional Rep Show) and buying from all three of our major categories of packs, tents, and sleeping bags.

2. Cancellations and Changes: On pre-season orders, any cancellation must be received in writing two weeks prior to scheduled shipping date. To avoid any misunderstanding, if requested we will contact you prior to scheduled shipping date for confirmation on your scheduled pre-season order. A partial cancellation or reduction of pre-season orders for more than 30% of the total order value will result in the order being billed at the regular terms rather than the pre-season discount terms as we cannot achieve the economies of efficient scheduling and delivery.

   Back orders will be cancelled after 60 days.

GENERAL TERMS

1. Payment Terms: Net 45 days, F.O.B. St. George, Utah.

2. Freight: Dealer prices quoted reflect shipments F.O.B. Factory, St. George, Utah.

3. Prices: Subject to change without notice.

4. Returns: Goods may not be returned to us without prior written return authorization. Unauthorized returns will not be accepted. This policy does not, of course, apply to warranty returns. Call Customer Service Dept. for return authorization. Ship all returns to Kelty Pack, Inc., 500 N. Industrial Road, St. George, Utah 84770.

5. Any order returned to Kelty will be subject to a re-stocking charge. The re-stocking charge will be 20% of the total dollar amount of the order.

6. Warranty: The decision to repair or replace under warranty rests solely with Kelty. Dealers are NOT authorized to replace defective goods without prior permission from Kelty Customer Service. Kelty's full lifetime warranty is shown in the catalog. In part it states that we unconditionally warrant all Kelty products against defects in materials or workmanship for the customer's lifetime. It does not cover defects attributable to or resulting from normal wear and tear, abuse or alteration.

7. Dealer Employee "Personal Use" Discount Program: Please contact your Ridgeway sales representative for information on this program.

8. Dealer agrees to pay all costs of collection or litigation arising out of past due accounts, including attorney's fees and court costs.

9. A $2.00 service charge will be applied to all orders whose total is less than $20.00.

10. Kelty requires minimum resale prices on certain of the products noted in the Dealer Price List in order to promote and maintain the image and overall quality of these products. Kelty will independently monitor this policy and may discontinue sales of goods to any dealer selling the products below the minimum resale price.

FRAME PACKS	NET PRICE	MIN. RESALE
Jr. Tioga	40.00	
Inyo	70.00	
Inyo Ltd.	80.00	
Tioga	110.00	
Woman's Tioga	110.00	
Tioga Super	120.00	
Expedition Tioga	135.00	
XFP Radial - 3/4	162.00	259.00
XFP Radial - Full	171.00	279.00
XFP Radial - Light	138.00	219.00
TENTS		
Windfoil Light	177.00	279.00
Windfoil Breeze	171.00	269.00
Windfoil II	270.00	439.00
Windfoil III	300.00	489.00
New Wave	195.00	319.00
Triple Crown - Standard Fly	225.00	369.00
Triple Crown - Vestibule Fly	240.00	399.00
Windfoil Light/Breeze Vestibule	60.00	
Windfoil Light/Breeze Expedition Frame Set	30.00	
SLEEPING BAGS		
Sprite	39.00	
LeTour	43.00	
Zephyr	76.00	
Silver Streak Regular	71.00	
Long	76.00	
Cirrus Regular	64.00	
Long	69.00	
Nimbus Regular	70.00	
Long	75.00	
Soft Touch Series		
Hot Foot 20° Regular	90.00	
Long	95.00	
Hot Foot 5° Regular	100.00	
Long	105.00	
Women's Hot Foot 20°	90.00	
Women's Hot Foot 5°	100.00	
Standard and Solarsilk		
Twenty Regular	85.00	
Long	90.00	
Five Regular	95.00	
Long	100.00	
Minus Fifteen Regular	105.00	
Long	110.00	
Minus Thirty Long (Solarsilk Only)	150.00	
SPECIALIZED SOFT PACKS		
Belt Pocket	4.00	Mini fanny 5.00
Fanny Pack - Adult	9.00	
M. C. Convertible	18.00	
Fanny Pack - Kids	6.00	
Kids/Adult Belt	7.50	
INTERNAL FRAME PACKS		
Red Wing Regular	45.00	
Red Wing Large	51.00	
Track Pack 4500	150.00	
Pod Packs - Top or Panel Load	75.00	
Accessory Pocket (Radial, Track Pack, Pod Packs)	14.00	
CONVERSION TRAVEL PACKS		
Windward	60.00	
Yankee	105.00	
Katmandu	120.00	
MOCKINGBIRD SERIES		
Mockingbird H.D.	39.00	
Mockingbird	30.00	

SOFT PACKS	NET PRICE
Swallow	13.75
WWF Special Edition	17.25
SOFT LUGGAGE	
Karri-All - Small	20.00
Medium	23.00
Large	26.00
Extra Large	29.00
Karri-Ons - I	19.00
II	25.00
III	37.00
IV	42.00
Super Karri-All - Large	32.00
Extra Large	37.00
BRIEFS	
Chief	11.00
Honcho	20.00
Top Dog	39.00
Leather Honcho	80.00
RAINWEAR	
Drizzle Jacket (non-breathable)	19.00
Drizzle Pants (non-breathable)	14.00
Monsoon Jacket (non-breathable)	42.00
Monsoon Pants (non-breathable)	33.00
Solution II Jacket (Gore-tex)	100.00
Solution II Pants (Gore-tex)	65.00
Chinook Jacket (Gore-tex)	110.00
Chinook Pants (Gore-tex)	80.00
Poncho - Backpacker	19.00
Pack Raincover	11.50
SLEEPING BAG ACCESSORIES	
Sleeping Bag Lash Straps: 24"	1.75
36"	2.00
42"	2.25
Stuff Sacks - sm & med 5.00, lg & xlg. 6.00	
Storage Stuff Sack	7.00
PACK PARTS	
Aluminum U-Ring (2 pkg)	1.50
Backband Upper Mesh	3.00
Clevis Pins - 1 1/8" (10/pkg)	2.75
1 3/8" (10/pkg)	2.75
1 9/16" (10/pkg)	2.75
Frame End Plugs/TOP (2/pkg)	1.25
BOTTOM (2/pkg)	1.25
Fastex Fastabs - Small	1.15
Large	1.70
Hold Open Frames: (Specify pack model & size)	2.50
Leather Accessory Strap - Small	.45
Large	.60
Packbag Attaching Wires	1.25
Shoulder Straps - Complete Set	7.00
Curved Shoulder Straps/Complete Set	11.00
Split Rings - Regular (10/pkg)	1.00
Waist Straps - Massif	16.00
Junior	6.00
Backpacker	10.75
Ultra Fit	17.00
Cam-Lock Buckle Set	5.50
PACK ACCESSORIES	
Cord Lock Set (2/pkg)	2.00
Frame Extensions - S/M; L/XL	5.50
Radial Frame Extension	7.00
Sternum Strap Set	2.00

SWAROVSKI

December 1, 1988

Dear Valued Retailer:

Re Pricing And The Collectibles Market/A Policy Statement

Retailers, by law, have absolute freedom to determine their own retail pricing structure as it best supports their own goals. Swarovski America Limited must also direct our activities as it best supports our goals. It is particularly our long-term goals which concern us in this policy statement.

Swarovski Silver Crystal is considered a fine full lead crystal giftware collectible. This status is supported by a formal collector group whose members number over 30,000. The attraction of owning collectibles is twofold: acquisition of a beautiful object and investing in its existing and anticipated future value.

It is the responsibility of manufacturer and retailer alike to foster collectibles value. Primary means of fostering this value lies in the product itself, combined with national advertising and retailer support. As much as we encourage competitiveness in the retail marketplace through creative advertising, merchandising, and in-store sales assistance, emphasis on discounted pricing is one avenue to be avoided. Contrary to established supply/demand dynamics, it is our belief that emphasis on reduced price actually diminishes demand, diminishes perceived value, and reduces the life cycle of a collectible. It is, therefore, important in collectibles marketing to adhere to emphasizing the quality, mystique, and collectiblity, and to avoid emphasis on "bargain" pricing.

Swarovski subscribes to, and supports, all efforts to seek to enhance the collectible image, but it requires a team effort. It is our intent that our authorized retailers maintain and enhance the image of Swarovski Silver Crystal as a fine collectible in all of their endeavors. For this reason, we have added to our Criteria for Selection and Continued Authorization as Swarovski Silver Crystal Retailers a position on advertising (see Point 5). This revised criteria will be effective January 1, 1989, and will be uniformly applied to all Silver Crystal retailers.

We believe that this formalization of policy, as it relates to pricing and advertising, will be welcomed by virtually all of our current retailers. We are confident that the few who may find it uncomfortable will re-evaluate their marketing practices relative to collectibles in general and Swarovski Silver Crystal specifically.

SWAROVSKI AMERICA LIMITED
2 SLATER ROAD · CRANSTON · RHODE ISLAND 02920 · (401) 463-3000 · (800) 556-6478 · FAX (401) 463-8459

SWAROVSKI

CRITERIA FOR SELECTION AND CONTINUED AUTHORIZATION AS SWAROVSKI SILVER CRYSTAL RETAILERS

1. Retail outlets selected must be fine gift or collectible stores, first class specialty stores, or fine jewelry stores with a separate gift department. Our intent is to develop the concept that our products can only be found in the finest stores.

2. Stores should not be located in close proximity to each other. We do not wish to saturate the market with our products.

3. Stores must agree to lease and utilize the Silver Crystal floor stand display or offer an alternative, comparable display which is acceptable to the company.

4. Stores must agree to display Silver Crystal products in a prominent and attractive manner suitable to the company and to utilize display aids which are provided by the company.

5. Stores must not emphasize discount pricing, either through in-store merchandising or advertising. There may be no comparison to "regular price" nor any reference to "savings". Our intent is that all merchandising/advertising be for the purpose of supporting the perception that Silver Crystal is a fine and valued collectible line.

6. Stores must agree to display a substantial representation from each product category throughout the year.

7. Stores must remain in good credit standing.

8. Stores must agree to display Silver Crystal products separately from all other products.

9. Store personnel should be informed and knowledgeable with regard to Silver Crystal products and ready to assist customers concerning our products at all times.

10. Retailer must agree that products are supplied on the condition that they only be sold at retail to customers on the approved retail premises.

11. All accounts and orders are subject to the approval and counter signature by Swarovski America Limited at its headquarters in Cranston, Rhode Island.

Determination as to compliance with these criteria shall be solely at the discretion of Swarovski America Limited at its headquarters in Cranston, Rhode Island.

Rev. 1/1/89

SWAROVSKI AMERICA LIMITED
2 SLATER ROAD · CRANSTON · RHODE ISLAND 02920 · (401) 463-3000 · (800) 556-6478 · FAX (401) 463-8459

Therm-a-Rest®

Cascade Designs, Inc. 4000 1st Avenue, S., Seattle, Washington 98134 (206) 583-0583
Telex: 4740074 ACMEPHONE SEA
March 15, 1985

WHOLESALE PRICE SCHEDULE

Item	Unit Price	Units Per Case	Case Price	Suggested Retail Price
THERM-A-REST Standard 3/4	$23.40	20	$468.00	
	$24.20	12	$290.40	$40.35
	$25.75	1	$ 25.75	
THERM-A-REST Standard Long	$31.40	12	$376.80	
	$32.40	6	$194.40	$54.20
	$34.50	1	$ 34.50	
THERM-A-REST ULTRA LITE 3/4	$24.40	24	$585.60	
	$25.20	12	$302.40	$41.95
	$26.90	1	$26.90	
THERM-A-REST ULTRA LITE Long	$33.00	12	$396.00	
	$34.00	6	$204.00	$56.90
	$36.20	1	$ 36.20	
CAMP REST *	$38.00	6	$228.00	$64.00
	$41.75	1	$ 41.75	

new! available June

** CAMP REST will be sold only to dealers for resale at or above $63.00.*

Item	Unit Price	Units Per Case	Case Price	Suggested Retail Price
COUPLE KIT	$ 1.90	12	$ 22.80	$ 3.80
POCKET PILLOW	$ 2.00	12	$ 24.00	$ 4.00
REPAIR KIT	$ 1.60	12	$ 19.20	$ 3.20
STUFF SACS [illegible]	$ 3.00	12	$ 36.00	$ 6.00
SPORTSEAT	$ 9.35	12	$112.20	$16.98
SlipFIX	$ 2.20	12	$ 26.40	$ 4.00
SPRAY DECK large and small sizes	$19.00			$32.75
COCKPIT COVER large and small sizes	$ 7.80			$13.50
COMBO BOX 2 Standard 3/4, 3 Standard Long, 2 ULTRA LITE 3/4, 2 ULTRA LITE Long, 4 Stuff Sacks, 1 each size; 1 Repair Kit			$277.60	

$25 Minimum Order.

NEW-$500 PROGRAM
Best price on all items for single shipment orders of $500 or more. Ask for details.

New Accounts only:
For initial orders requiring immediate shipment, payments must be by certified check. To establish credit please furnish standard credit information.

For Established Accounts:
Standard terms are 2% 10 net 30 on accounts approved for open credit. To qualify for the discount, payment must be mailed within 10 days of invoice date. A finance charge of 2% per month is charged on past due accounts. Please refer to Cascade Designs Inc.'s "Terms and Conditions of Sale" for complete details.

All orders F.O.B. Seattle

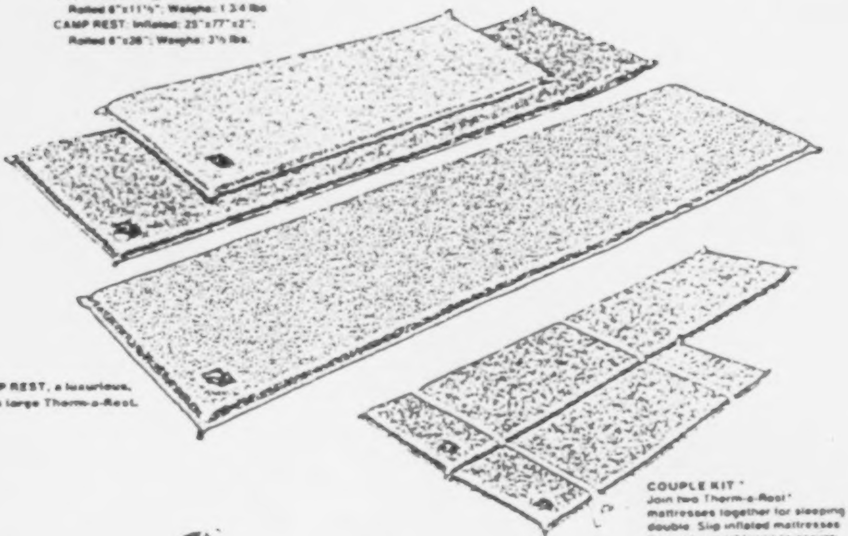
Send orders to: Cascade Designs Inc.
4000 1st Avenue S.
Seattle, WA 98134

Phone orders to: (206) 583-0583
hours: 8:00am-4:30pm P.S.T.

Self-INFLATING, INSULATING MATTRESSES.

Therm-a-Rest® provides greater comfort and more insulation than conventional foam pads or air mattresses.

Standard 3/4 length: Inflated: 20"x47"x1½";
Rolled 4"x21"; Weighs: 1½ lbs.
Standard Long: Inflated: 20"x72"x1½";
Rolled 5"x21"; Weighs: 2¼ lbs.
ULTRA LITE 3/4 length: Inflated 20"x47"x1";
Rolled: 4"x11½"; Weighs: 17 oz.
ULTRA LITE Long: Inflated: 20"x72"x1";
Rolled 6"x11½"; Weighs: 1 3/4 lbs.
CAMP REST: Inflated: 25"x77"x2";
Rolled 6"x26"; Weighs: 3½ lbs.



CAMP REST, a luxurious, extra large Therm-a-Rest.

COUPLE KIT™
Join two Therm-a-Rest® mattresses together for sleeping double. Slip inflated mattresses through paired loops to secure each side by side. An attached bag provides night storage for small items. Use with all models of Therm-a-Rest®. Weight 1¼ oz.

POCKET PILLOW™
Make a parka a pillow. For an extra touch of comfort, stuff a parka or other clothing into the flannel-like softness of a Pocket Pillow. Fabric content: 85% Acetate, 15% Nylon. Size 15"x20". Weight 1¼ oz.

STUFF SACS
Nylon stuff sacs with a toggle draw cord closure are available for all sizes of Therm-a-Rest® mattresses. ¾ length: 4" dia. by 23"; Full length: 5" dia. by 23"; ULTRA LITE ¾: 5" dia. by 12½"; ULTRA LITE Long: 5½" dia. by 12½"; CAMP REST: 6½" dia. by 28".

SPORT SEAT™
Take this light, compact and warm cushion to stadium events, hunting, fishing, camping, canoeing, ski touring, hiking, and even car touring. Inflated: 12"x16"x1½" Rolled: 2"x15". Weight: 7 oz.

SlipFIX™
Spray on a high friction coating to reduce slippage on Therm-a-Rest® mattresses and slick surfaces like sailboards. Improve grip on gloves, mittens and canoe paddles. Good for tennis and racquet ball strings. It will even repair small leaks in mattresses and fabric gear.
Weight: 5 oz. AVO

REPAIR KIT
Ready in minutes, repair a ripped parka, a leaky tent, and even a damaged mattress. Designed for use under the adverse conditions of camping, the kit contains a tube of Bond-Aid® rubber adhesive and adhesive-backed fabric patches. Each can be used separately or combined for tough, permanent patches. Weight: 1 oz.

Therm-a-REST

Cascade Designs, Inc.

1989 Advertising and Distribution Policy for Select Tennis Products

Wilson has determined that consumer loyalty to its professional tennis products (the "Professional Products") develops best when high quality products are sold through broad quality-based distribution channels and sold by retailers who promote Wilson's superior product image. Wilson has further determined that retailers who engage in advertising the sale of Professional Products at a substantial discount from Wilson's Suggested Retail Price significantly erode both the broad quality-based distribution channels for the Professional Products and the superior image attached by the consumer to the Professional Products.

Therefore, until further notice is given, it is the policy of Wilson that:

1. Wilson will maintain a list of the Professional Products, which list may change periodically.

2. Wilson will assign to each of the Professional Products a Suggested Retail Price, which prices may change periodically.

3. Wilson will assign to each of the Professional Products a Discount Price which may represent a discount from the Suggested Retail Price. The Discount Prices may change periodically. The Discount Price for a Professional Product reflects Wilson's determination that to permit retailers to advertise the sale of Professional Products below such price will result in erosion of the broad quality-based distribution for and the superior image of the Professional Products.

4. Sales representatives shall promptly inform their accounts of all changes to the list of Professional Products and the related Suggested Retail Prices and Discount Prices.

5. Retailers who advertise a Professional Product for sale at a price below the Discount Price, or at a "call for price" which price is below the Discount Price, shall have the allocation of such Professional Product terminated indefinitely without prior notice.

6. Additionally, retailers who use deceptive or disparaging sales or advertising techniques, including "bait and switch" tactics, or who engage in any other types of sales practices which are illegal or which could have a negative impact on Wilson's image shall have the allocation of Wilson products terminated indefinitely without notice.

7. Sales representatives are in no event permitted to discuss or influence pricing policies with retailers. Retailers must make independent decisions regarding pricing. Sales representatives should limit their activities with respect to this Policy to distributing a copy of the Policy to a retailer and informing the retailer of the current list of Professional Products and Wilson's Suggested Retail Prices and Discount Prices for the Professional Products.

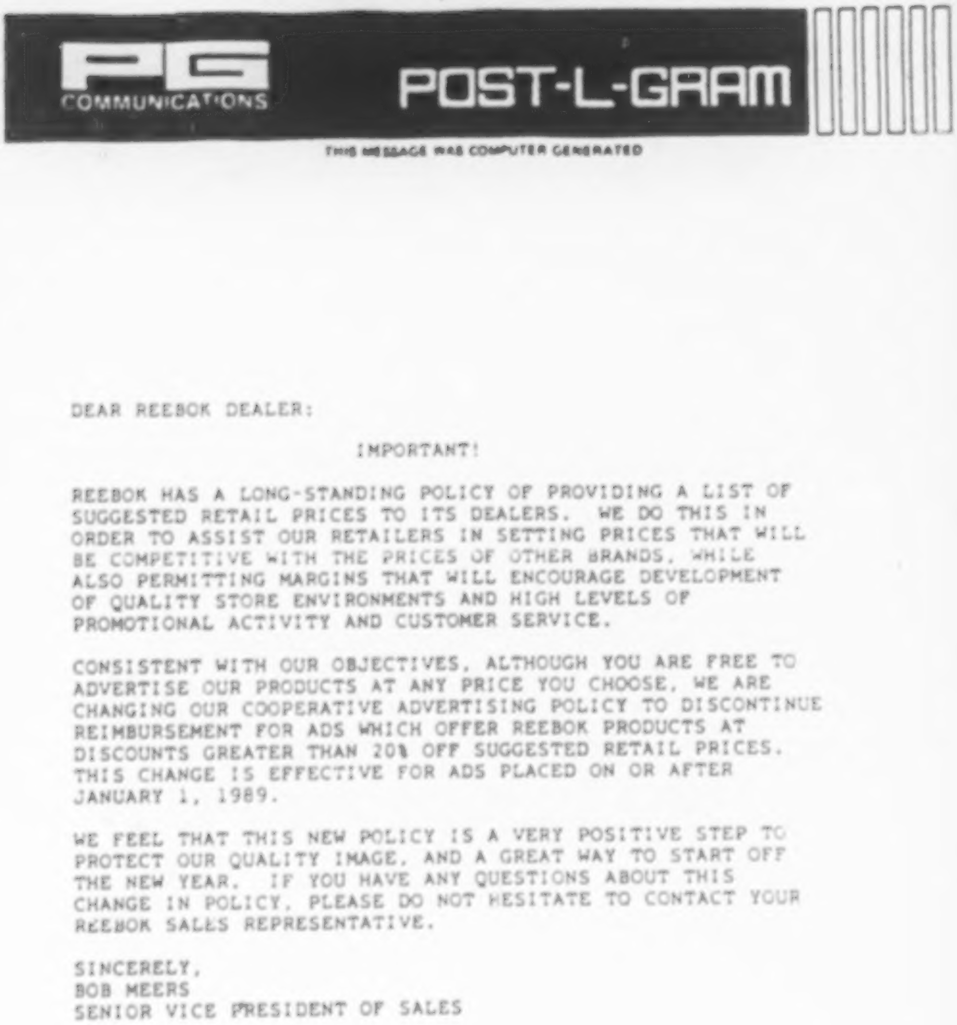
8. All questions regarding the Policy and its enforcement should be referred, if necessary, to Jeff Harmet, Marketing Manager, Performance Rackets.

mg

LIST OF PROFESSIONAL PRODUCTS AS OF FEBRUARY 1, 1989

fessional Products	Suggested Retail Price	Discount Price
file 2.7si 95",110"	$225.00	$199.99
file 3.6si 95",110"	$189.99	$189.99
ra TPK 95", 110"	$165.00	$139.99
ra Kevlar 95", 110"	$139.99	$129.99
ra Kevlar Superlite 95", 110"	$139.99	$129.99
ra Graphite 95", 110"	$109.99	$ 99.99

ATTACHMENT B



PG COMMUNICATIONS POST-L-GRAM

THIS MESSAGE WAS COMPUTER GENERATED

DEAR REEBOK DEALER:

IMPORTANT!

REEBOK HAS A LONG-STANDING POLICY OF PROVIDING A LIST OF SUGGESTED RETAIL PRICES TO ITS DEALERS. WE DO THIS IN ORDER TO ASSIST OUR RETAILERS IN SETTING PRICES THAT WILL BE COMPETITIVE WITH THE PRICES OF OTHER BRANDS, WHILE ALSO PERMITTING MARGINS THAT WILL ENCOURAGE DEVELOPMENT OF QUALITY STORE ENVIRONMENTS AND HIGH LEVELS OF PROMOTIONAL ACTIVITY AND CUSTOMER SERVICE.

CONSISTENT WITH OUR OBJECTIVES, ALTHOUGH YOU ARE FREE TO ADVERTISE OUR PRODUCTS AT ANY PRICE YOU CHOOSE, WE ARE CHANGING OUR COOPERATIVE ADVERTISING POLICY TO DISCONTINUE REIMBURSEMENT FOR ADS WHICH OFFER REEBOK PRODUCTS AT DISCOUNTS GREATER THAN 20% OFF SUGGESTED RETAIL PRICES. THIS CHANGE IS EFFECTIVE FOR ADS PLACED ON OR AFTER JANUARY 1, 1989.

WE FEEL THAT THIS NEW POLICY IS A VERY POSITIVE STEP TO PROTECT OUR QUALITY IMAGE, AND A GREAT WAY TO START OFF THE NEW YEAR. IF YOU HAVE ANY QUESTIONS ABOUT THIS CHANGE IN POLICY, PLEASE DO NOT HESITATE TO CONTACT YOUR REEBOK SALES REPRESENTATIVE.

SINCERELY,
BOB MEERS
SENIOR VICE PRESIDENT OF SALES

Champion

CHAMPION PRODUCTS INC.

3141 Monroe Avenue
P.O. Box 850
Rochester, New York 14603-0850
Telephone 716/385-3200

December 2, 1988

Dear Champion Dealer:

Champion has initiated a new policy regarding suggested retail prices to our dealers. We do this in order to assist our retailers in setting prices that will be competitive with the prices of other brands while also permitting margins that will encourage development of quality store environments and high levels of promotional activities and customer service.

Consistent with these objectives, although you are free to advertise our products at any price you choose, we are changing our cooperative advertising policy to discontinue reimbursement for ads which offer Champion merchandise at discounts greater than 20% off suggested retail; and our "Guidelines for Co-op Advertising and Promotions" are hereby amended in accordance with the above.

We feel confident this is a very positive step in protecting our quality image. If you have any questions about this policy, please do not hesitate to contact your Champion sales representative.

Sincerely,

Frank Masterson
Vice President of Sales
Retail Division

/er

Telex 978221 CHAMPION ROC • Facsimile 716/385-8967

August 10, 1988

RE: Minimum Advertised Price Policy

Dear Connelly Dealer:

Connelly Skis, Inc. announces the establishment of the following advertising policy:

1. No dealer shall advertise in any manner the products listed in paragraph two at a price greater than twenty-nine (29%) percent off Connelly's published suggested retail price.

2. This policy shall apply to the following Connelly Performance and Signature Series slalom ski models: Concept, HP, Shortline 3, Team 2, Avante, Wake Special, and Kevlar Pro. This policy does not apply to skis other than these listed models, nor does it apply to Connelly accessories and other products.

3. For purposes of this policy, "advertise" shall be defined as any written or oral communication to the public which is intended to promote, encourage, or increase patronage or sales, including, but not limited to, newspapers, magazines, catalogs, flyers, letters and brochures. "Advertise" does not include in-store communications or telephonic inquiries.

4. This policy shall be in effect from October 1 to July 14 of each year.

Connelly reserves the right in its unilateral discretion to terminate its relationship with any dealer that Connelly determines has failed to comply with the above-described minimum advertised price policy.

Any questions regarding this policy are to be addressed to me in writing.

Thank you.

Sincerely,

GORDY HOLMES

Gordon L. Holmes
Vice President, Marketing
CONNELLY SKIS, INC.

NIKON INC
[illegible] STEWART AVE
GARDEN CITY, NY 11530-4763
516-222-[illegible]
TELEX: [illegible]

September 20, 1988

Dear Nikon Consumer Products Dealer:

We have written to you before about our ongoing efforts to build upon the reputation of Nikon photographic products making them more attractive to consumers and more competitive with products made by other manufacturers. We are writing now to inform you of an aspect of this effort that will affect the Nikon Cooperative Advertising Program beginning November 1, 1988.

We believe the image and market positioning of our products, especially new products, is strongly influenced by the prices consumers see advertised for them. This has a direct effect on the competitive success of these products. You are, of course, entitled to sell the products you purchase from us at whatever price you determine, and to advertise that price. We have decided, however, that we will no longer subsidize advertising that we believe undercuts the market position of products for which market positioning is a critical element of success.

While we believe this applies to all Nikon products, it is difficult to reverse the effect that advertising has had on products that have been on the market for some time. As a result, our initial directic will be toward new products.

Accordingly, we have revised our Cooperative Advertising Program anc as of November 1, 1988, the enclosed Nikon Cooperative Advertising Program is effective. Please review the total program requirements and, in particular, note the following changes that have been made:

1. Eligible Media - Print: All publications, including general-interest newspapers, magazines and other print media, which are either listed in Standard Rates and Data (SRDS) or ca provide a printed rate card and circulation statement verifiabl through independent audit, are now considered eligible media fo co-op reimbursement.

2. Any advertisement appearing on or after November 1, 1988, for the recently announced Nikon Zoom-Touch 500 camera or VN820 Video camera will be eligible for co-op reimbursement if:

   A. (i) it is for the camera only and specifies a price no lower than the Minimum Advertised Price for that camera (See attached list); or

      (ii) it is for the camera only and mentions no price ("call for price" is acceptable).

AND

B. the price or value of the camera is not obscured by combining its price or value with that of other products offered in the advertisement.

Thus, an advertisement for a Nikon Zoom-Touch 500 or a VN820 at a price below the Minimum Advertised Price does not qualify for reimbursement, nor does an advertisement for a Zoom-Touch 500 camera or VN820 Video camera with any accessory. Likewise, an advertisement for a Nikon Zoom-Touch 500 or VN820 which also contains an offer for another product at a special price based upon the purchase of a camera does not qualify for reimbursement.

Any advertisement which is ineligible for reimbursement under requirement #2. above, will also disqualify for reimbursement all advertisements for any Nikon product appearing thirty (30) days before and thirty (30) days after the ineligible advertisement appears.

Thus, if you run an advertisement for a Zoom-Touch 500 or VN820 camera that is not eligible for reimbursement because it mentions a price below the Minimum Advertised Price; or contain an accessory; or contains an offer for another product at a special price which is contingent upon the purchase of a camera you must pay for that advertisement yourself, and also for any and all advertisements on any Nikon product you ran during the preceding 30 days, and all advertisements for any Nikon product you run during the following 30 days. Any co-op credit (reimbursement) that might have been issued to you during the preceding 30 day period will be charged back to your account.

To emphasize once again, you are free to determine for yourself at what price you wish to sell a product for, and to advertise that product at your own expense. The only effect of these changes is that Nikon will not pay for advertising that we believe has a detrimental effect on the reputation and market position of these Nikon products. We feel certain that you will understand that building the reputation and competitiveness of Nikon products will ultimately benefit all of our dealers as well as Nikon.

Your Regional Sales Manager will be happy to answer any questions you may have.

Sincerely yours,

Richard LoPinto
Division Manager
Marketing

RL:ml
Enclosure

J. W. (Jim) Coker
National Sales Manager
Special Markets & Catalog Sales

317 267 6093

RCA

May 23, 1988

Effective July 1, 1988 Thomson Consumer Electronics is modifying its Cooperative Advertising Policy as it applies to certain RCA-brand television receivers, VCR's and Camcorders and all RCA Dimensia products.

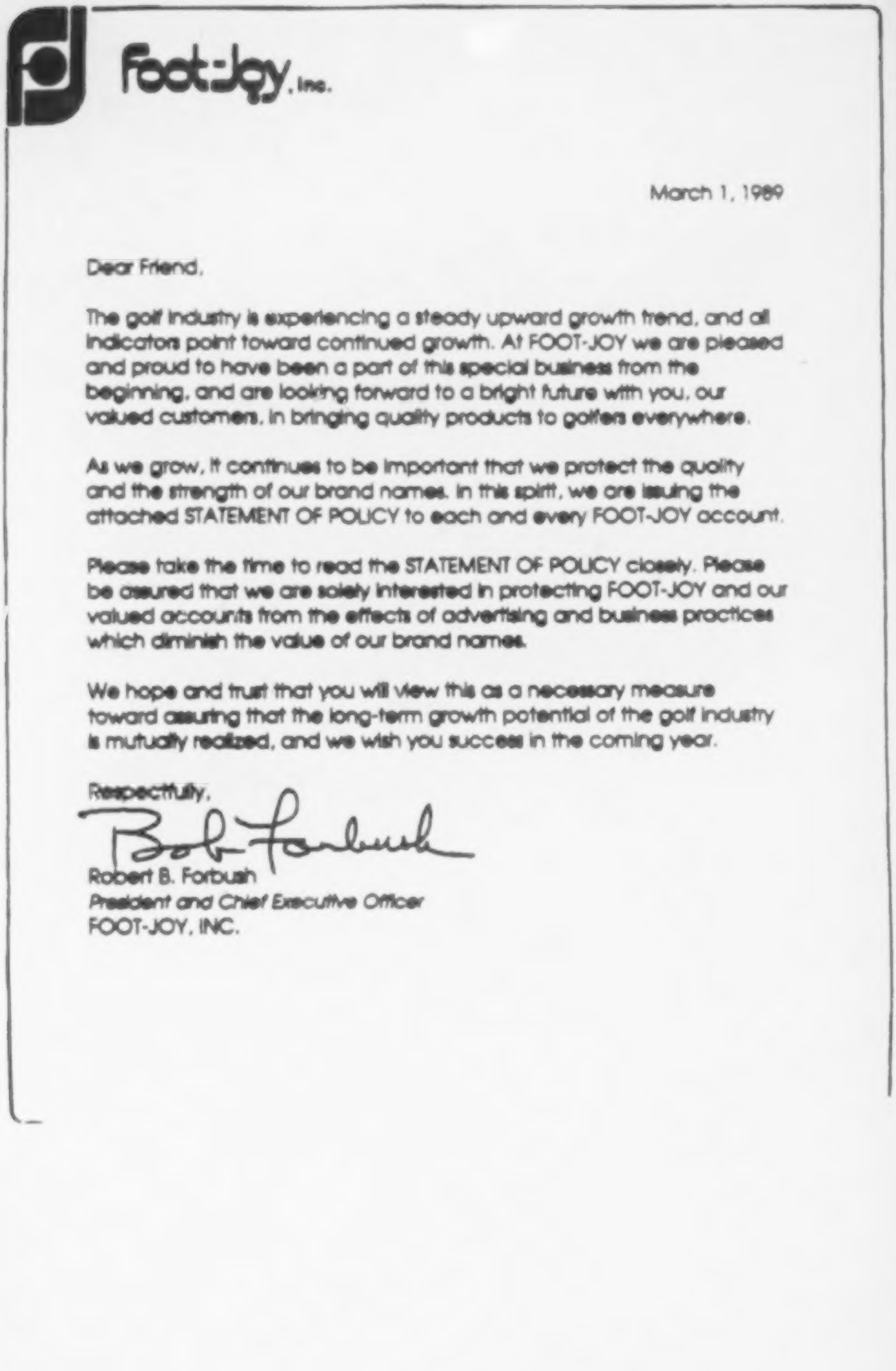
A list of models of RCA and Dimensia products is attached and for each model you will find a "suggested retail price" which is our opinion of what the product is worth at retail. Of course, what you actually sell the product for is entirely your decision. With each ColorTrak 2000 and Dimensia product you will also find a "min-adv-price". This is the minimum advertised price at which your advertising qualifies for co-op or supplemental advertising funds. Of course, what you actually sell the product for is entirely your decision.

To be eligible to receive advertising support funds, RCA or Dimensia product model numbers must be used in all ads, products which have a Minimum Advertised Price must be advertised with no price or with a price at least equal to the Minimum Advertised Price for that product and all ads must comply with the requirements of our Co-op Advertising Plan. You may advertise RCA products at any prices you choose; but all of your unspent advertising support funds accrued in the thirty days prior to the date of the ad will be cancelled and you will accrue no advertising support funds for a thirty day period if you advertise any RCA product at a price lower than our Minimum Advertised Price. For example, deducting a trade-in allowance from the Minimum Advertised Price in your ad will make you ineligible to receive advertising funds for that ad, result in cancellation of unspent funds accured in the prior thirty days and disqualify you from receiving advertising fund accruals on your purchases for the next thirty days. Further details are in the enclosed RCA Dealer Advertising Plan Supplement.

We feel the adoption of this policy modification is necessary to protect the quality image of our premium products. Please note that this policy modification does not affect your actual retail prices. It relates only to the circumstances under which we will reimburse your advertising expenses. The price at which you sell these products at retail continues to be entirely your decision.

Very truly yours,

Thomson Consumer Electronics, Inc.
600 N. Sherman Dr./P.O. Box 1976, Indianapolis, IN 46206-1976



FootJoy, Inc.

March 1, 1989

Dear Friend,

The golf industry is experiencing a steady upward growth trend, and all indicators point toward continued growth. At FOOT-JOY we are pleased and proud to have been a part of this special business from the beginning, and are looking forward to a bright future with you, our valued customers, in bringing quality products to golfers everywhere.

As we grow, it continues to be important that we protect the quality and the strength of our brand names. In this spitt, we are issuing the attached STATEMENT OF POLICY to each and every FOOT-JOY account.

Please take the time to read the STATEMENT OF POLICY closely. Please be assured that we are solely interested in protecting FOOT-JOY and our valued accounts from the effects of advertising and business practices which diminish the value of our brand names.

We hope and trust that you will view this as a necessary measure toward assuring that the long-term growth potential of the golf industry is mutually realized, and we wish you success in the coming year.

Respectfully,

Bob Forbush

Robert B. Forbush
President and Chief Executive Officer
FOOT-JOY, INC.

FOOT-JOY, INC.

STATEMENT OF POLICY

It is the purpose and mission of FOOT-JOY, INC. to provide our customers with products of the highest quality, and to sell those products through Professional Golf Shops and other retailers who devote their efforts to the sale and service of such products. The STATEMENT OF POLICY is to affirm the intention of FOOT-JOY, INC. to protect the quality image and goodwill of our products, brand names and trademarks.

To this end, FOOT-JOY, INC. will not sell or will discontinue selling its products to golf shops and other retailers who:

A. Fail to adequately represent and promote the quality image and goodwill associated with FOOT-JOY branded products.

B. Engage in any form of advertising practice through any media which is intended to represent FOOT-JOY products as "loss leaders" or targets of "bait and switch" retail practices.

C. Publish any advertisement for FOOT-JOY products that refers specifically to a price lower than 20% below manufacturer's suggested retail price for current year catalog products. Point-of-sale pricing information is excluded. Advertisements that read "Call for Pricing" are acceptable. Close-out, factory defect, and non-catalog merchandise must be clearly identified as such in any advertisements offering specific prices.

D. Fail to comply with all applicable federal, state and local laws and ordinances which regulate sales and advertising practices by retailers.

E. Fail to maintain a qualified staff of golf and/or footwear sales professionals to inform and assist consumers in selecting their FOOT-JOY products.

F. Re-sell FOOT-JOY products to customers other than consumers.

Recognizing that existing accounts may require time to adjust their current practices so as to assure that all of those practices fully comply with the above STATEMENT OF POLICY, FOOT-JOY will issue a one-time-only warning to an account not adhering to this STATEMENT OF POLICY, and will discontinue selling to any account which violates the Policy after receiving a warning.

FOOT-JOY, INC. will continue to value the business and support of its accounts who share our commitment to quality.

Foot-Joy.

MINIMUM ADVERTISING

As of July 1, 1988 Commodore will suggest minimum advertised prices on many of its products. These guidelines will apply to advertising that is planned and executed after this date, and are relevant to all channels of distribution.

These suggested minimum advertised prices are solely determined by Commodore and will be reviewed quarterly to determine their competitiveness in a free and orderly market.

Any of our customers may of course resell our products at prices they determine. However, Commodore will not be obliged to pay advertising claims for products advertised below the minimum levels. This action initiated by Commodore will apply to customers sold by distributors, as well as direct accounts.

CONSUMER PRODUCTS:

Suggested minimum advertised prices

Product		Suggested Retail	Minimum Advertising Price
C64C	Computer	$ 229.95	$ 149
C128D	"	599.95	489
PC10 "COLT"	"	899.95	749
C1541-II	Disk Drive	229.95	179
C1581	"	249.95	229

NIKE

ATTENTION NIKE RETAILERS

NOTICE OF CO-OP PROGRAM CHANGES

November 1988

Recapped below are the main changes for NIKE's 1989 Co-op Program. As in the past, the NIKE Co-op Program offers 100% reimbursement, up to your accrued balance, on all qualifying advertisements. The complete program guidelines are enclosed for your use. Be sure to check the NIKE-AIR Incentive Program. It will help you get the most out of your co-op accrual.

YOU ARE FREE TO ADVERTISE AND SELL NIKE PRODUCTS FOR WHATEVER PRICE YOU DESIRE; HOWEVER, TO QUALIFY FOR CO-OP REIMBURSEMENT, THE GUIDELINES STATED IN THE 1989 CO-OP PROGRAM MUST BE FOLLOWED.

Effective January 1, 1989:

The NIKE-AIR Incentive Program will be expanded to include apparel and accessories.

If price is advertised for NIKE-AIR products, the price must be within 10% of the NIKE suggested retail price.

A 50% incentive can be earned on NIKE-AIR advertising.
(see the program for complete guidelines)

Effective July 1, 1989:

All ads must be at least 1/2 NIKE and meet basic size requirements.

All NIKE products, on a page or in an ad, must be grouped together within a distinct border.

Style names must be listed in the ad to help identify the product.

If price is advertised for non-air products, the price must be within 20% of the NIKE suggested retail price. (The Custom-Color Footwear Program is excluded from this guideline)

DIRECT PROGRAM INQUIRIES TO:

NIKE CO-OP ADVERTISING
9300 S.W. NIMBUS DRIVE, BEAVERTON, OR 97005
(503) 644-9000

IMRA International Mass Retail Association, Inc.

Headquarters:
570 Seventh Avenue
New York, N.Y. 10018
(212) 354-6600
Fax # 212-382-2706

Richard I. Hersh
President

Government Relations Office:
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 861-0774
Fax # 202-785-4588

June 30, 1989

Theresa Lauerhass
Senate Judiciary Committee,
Antitrust Subcommittee
Washington, D.C. 20510

Dear Ms. Lauerhass:

I am pleased to furnish, as requested in Senator Metzenbaum's letter dated June 16, 1989, answers to the supplemental questions Senator Thurmond had for IMRA's witness, Mr. Raymond Zimmerman. IMRA would be pleased to provide the Committee with any additional information it may need.

Q1. Mr. Zimmerman, you state in your prepared testimony that to prove a resale price fixing conspiracy now takes enormous effort, substantial resources and great luck. I agree that to prove a vertical price fixing case is not easy. But I have difficulty with the argument that just because it's hard, we should lessen the proof. In my view, if the law requires proof of an agreement, than a plaintiff should be required to prove the existence of an agreement, not something less. Would you please comment.

A1. Clearly, a plaintiff should be required to carry the burden of proof, although a difficult task in this type of case. It is unfair however, to deny the plaintiff the benefit of inferences ordinarily available to litigants and, further, to require that the litigant affirmatively disprove any theory consistent with a defendant's innocence. No proponent of this legislation seeks to eliminate the requirement that there be an agreement; to the contrary, we are unanimous in our recognition that unilateral conduct is not to be challenged under this bill. What we are seeking, however, is a legislative recognition that, contrary to lower court interpretations of *Monsanto*, an "agreement" may be inferred to exist where there is evidence that a high-priced retailer made a communication to a supplier about another retailer's prices, and *because* of that communication, the supplier terminated, or restricted supply to, the low-priced retailer. That kind of evidence should be sufficient to allow, but not compel, a jury to find that there was an agreement.

Q2. You also state in your prepared remarks that anti-competitive conduct is on the increase, and you assume, at lease in part, that because of the decisions in *Monsanto* and *Sharp* no one is challenging this conduct. Would you please elaborate on this, and then explain how, in spite of these anti-competitive activities, discount operations have experienced such enormous growth in the 1980's?

A2. The discount retail industry has, as a whole, prospered since the repeal of fair trade in 1975. While such success has been largely attributable to the discounters' policies, it is also a reflection of discount retail managers' skills in real estate matters, store operations, advertising, and return policies, customer identification and a whole host of management and entrepreneurial skills. Unfortunately, some discount retailers have failed despite their diligent efforts. This discussion, however, is largely beside the point. The issue is not how healthy is the retail environment; the issue, rather, is what is in the public's best interest. On that question, the answer is clear. We ought to have antitrust laws which encourage low prices and discourage price fixing, whether horizontal or vertical. The retail industry is consistently changing -- the so-called "Wheel of Retailing" keeps turning, bringing new concepts of distribution to the market. Tomorrow may see the discount department store on the wane and some other retail concept in vogue. What never changes, however, is the need to maximize consumer welfare through our antitrust and trade regulation laws.

Sincerely yours,

Robert J. Verdisco

Robert J. Verdisco,
Vice President
Government Relations

for Raymond Zimmerman
and IMRA

Monroe G. Milstein

Chairman of the Board

Burlington Coat Factory Warehouse

Written Testimony

presented at a hearing before the

Senate Judiciary Committee

on

Thursday June 1, 1989

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INTRODUCTION

Mr. Chairman, Members of the Committee, I am Monroe G. Milstein, President of the Burlington Coat Factory Warehouse Corporation, headquartered in Burlington, New Jersey. Burlington Coat Factory is an apparel retailer that consistently sells name-brand merchandise at prices well below those charged by traditional department and specialty stores.

The company is a member of the International Mass Retail Association which represents most of the nation's price-competitive general merchandise retail industry.

Our business was begun by my father, Abe, as a coat wholesaler in 1924. This enterprise led us into retailing in 1972, the year we bought the old abandoned Modecraft Factory Outlet on Route 130 in Burlington, New Jersey. We re-opened the company as the Burlington Coat Factory Warehouse and opened our first retail location there.

I have been Chairman of the Board, President and a Director of the Burlington Coat Factory from its inception in 1972. Prior to 1972, I was President of Monroe G. Milstein, Inc., a wholesaler of outerwear located in New York and now a wholly-owned subsidiary of the Burlington Coat Factory Warehouse.

I come before you today to voice our whole-hearted support for S. 865, Senators Metzenbaum, Rudman, Bradley, Gorton, Simon, Wilson and fourteen other Democratic and Republican members, " The Consumer Protection Against Price-Fixing Act of 1989", a bill which has strong bipartisan support. If passed, the measure is likely to deter one of the most common forms of price-fixing in our industry.

I have previously testified before this committee to voice my grave concern regarding various attempts by government officials to weaken the antitrust laws and expose our industry to the ever-increasing threat of anticompetitive practices which cause price-fixing. These activities were both anticonsumer and antibusiness.

I am pleased to be here to support a bill which is a legislative effort to strengthen, rather than weaken, antitrust enforcement. I believe that this measure represents a positive step toward preserving the original intent of antitrust laws. Until recently, we had a fairly clear idea of what constituted legitimate business practices and illegal anticompetitive practices.

During my early years in retailing, I understood that marketplace activities which were obviously unfair and anticompetitive were against the antitrust laws, but today my attorneys tell me that many such activities have been held legal by the Supreme Court and other Federal courts. Many U. S. officials have gone so far as to argue that even such clearly restrictive activities as price-fixing could be pro-competitive.

During those first fifty-eight years of my family's being in business, price-fixing was invariably considered to be illegal conduct. However, during the last eight years antitrust enforcement officials have thrown the marketplace into chaos with unproven and impractical economic theories, which have depicted some forms of price-fixing as innocuous. Unfortunately, the Judiciary has accepted much of this specious reasoning. As a result, a cloud hangs over not only my industry and manufacturers but also over the consumer as well. Manufacturers, retailers, consumers, the Judiciary, Senators, lawyers and economists believed that our antitrust laws prohibited every form of price-fixing.

The legislative history of the Sherman Act evidences a Congressional intent to let the entire marketplace, free of private restraints, determine the proper allocation of resources. However, the officials charged with the duty to enforce our Federal antitrust laws have actively argued in the press, before Congress, and to the Courts that certain antitrust laws which prohibit price-fixing should either be changed or not be enforced. These officials have exposed our industry and the consumer to policies based on an antitrust philosophy by which not only are manufacturers given freer rein to control every step of the distribution process, but also full-price retailers are almost encouraged to conduct anticompetitive practices.

Since our industry's success has resulted from our ability to offer the consumer first quality merchandise at low prices, we are justifiably concerned by any such attempt to undermine the strict prohibition against price-fixing.

It is interesting to note that following the repeal of the so-called "Fair Trade" laws in 1975, which you, Mr. Chairman, recognize as being very important to the welfare of consumers, my company has grown from one retail outlet to a present total of 134 stores throughout the nation. Such growth would have been impossible if the old laws which permitted resale price maintenance had not been abrogated by Congress. Today, however, our continued growth and viability are threatened on several fronts.

THE JUSTICE DEPARTMENT'S ECONOMIC THEORY AND ACTIONS

There is a need to retrace, briefly, some historical events and issues of the past decade. From 1975 to 1980, after the repeal of "Fair Trade" laws, Burlington Coat Factory seldom experienced attempts at price-fixing. We believe this was due to both the enforcement policies of Federal officials and the financial implications of treble damages in private litigation. This favorable climate changed drastically after 1980.

In the early 1980's, former Assistant Attorney General Baxter and Former FTC Chairman Miller initiated an assault on the antitrust laws, including the prohibition against resale price maintenance (RPM). I understand that they viewed RPM as beneficial, supposedly because RPM corrects market failure and enables the consumer to receive complex technological products and/or products that require relatively large amounts of point-of-sale service. Under this theory, it was argued, RPM might promote entry into some lines of business, thus, potentially increasing competition. It is a mystery to me why such matters relating to high technology fields should apply across the board in industries such as apparel, where no high technological services are needed.

Furthermore, they contended that attempts to institute RPM where it is not competitively beneficial will be corrected by the marketplace. Thus, they say, government policing of RPM agreements under the PER SE rule is unnecessary.

HARM OF RPM

This economic Theory contrasts sharply with the view taken by Congress....with the benefit of careful study of actual marketplace conditions....when Congress repealed the "Fair Trade" laws and made RPM a PER SE violation in all cases. Most members of Congress have tended to agree with industry experts that, in fact, RPM:

A. denies to consumers the ability to choose the level of service they want;

B. is an umbrella that protects inefficient producers;

C. facilitates agreed upon pricing by manufacturers;

D. serves only to increase prices to consumers;

E. deters new competition by depriving prospective entrants into the market of a principal competitive tool, price cutting.

SENATOR THURMOND SPEAKS OUT

One United States' Senator who spoke on this issue and clearly recognized the importance of eliminating price-fixing as being in the best interest of the Country was Senator Thurmond. The following is his statement:

> ADDITIONAL VIEWS OF SENATOR STROM THURMOND (R-SC) ON H.R. 6971, A BILL TO REPEAL ENABLING LEGISLATION FOR FAIR TRADE LAWS:
>
> The question should be raised as to whether it is desirable to pass Federal legislation to repeal existing fair trade laws. Under the Miller-Tydings Act and McGuire Act, the respective States are not required to enact fair trade laws and nonsigner provisions, but are merely given the opportunity to do so if they wish. Congress has permitted the States to enact fair trade laws since 1937, almost forty years ago, and reinforced that right in 1952.
>
> I firmly believe in the fulfillment of the spirit, as well as the letter, of the Constitution of the United States regarding the Tenth Amendment's preservation of the powers and the rights of the States and the people.

Some years ago, I strongly opposed the effort on the Federal level to impose a national fair trade law upon this Country. I remain concerned that the separate States be allowed to make decisions regarding fair trade laws to the greatest extent possible.

In view of my respect for the integrity of the individual States, I have given careful thought to whether the Federal Government should supplant the judgment of the States in this area. In considering this matter, I have been aware the States have not been completely insensitive to the need to make changes in this area as shown by the fact that a number of States in recent years have moved to repeal their fair trade laws.

After careful thought and analysis, I conclude that I will not dissent from the decision of this Committee to favorably report H.R. 6971. A review of the record indicates repeal of the fair trade laws in the various States should be in the best interest of the Country. Lower prices should be available to consumers, and a substantial contribution should be made in the effort to control inflation.

> On balance, it appears the positive benefits produced by this legislation should outweigh any negative effects it would have. I have concluded that it is less objectionable to enact legislation disallowing fair trade laws than it is for the Congress to continue to sanction price-fixing that results from the existence of fair trade laws.

However, during the Reagan administration, the Justice Department and the FTC embarked on a blatant policy of non-enforcement and attempted to change the existing antitrust laws forbidding price-fixing. Congress found it necessary to restrict the Justice Department's appropriations so that it would not try to change the existing Per SE rule on RPM as Justice attempted in the MONSANTO case.

PREVIOUS CONGRESSIONAL ACTION

Unfortunately, the appropriations restriction did not deter the antitrust division from coming forward with the much criticized "Vertical Restraints Guidelines". The Justice Department's guidelines provided a novel, but very dangerous interpretation to the antitrust laws concerning price-fixing. Congress and the State Attorneys General were outraged and, in a bipartisan effort, Congress reinstated the appropriations restrictions and called for the Justice Department to withdraw "Vertical Restraints Guidelines". It is our understanding that in spite of the call for withdrawal, Representative Fish, in a speech to a trade group, noted that several judicial opinions had relied upon the discredited guidelines.

We businessmen are startled that the Justice Department would denounce the per se rule when the empirical data, as presented to Congress in 1975, substantiated that:

A. consumers paid 10% to 27% higher prices in states that allowed price-fixing than in states that excluded price-fixing;

B. more businesses failed in states that allowed price-fixing versus those states that excluded price-fixing;

C. fewer new businesses entered the marketplace in states that allowed price-fixing than in states that excluded price-fixing.

Unable to rebut such hard, statistical evidence, representatives of the prior administration have ignored the facts in favor of unsubstantiated economic theories which find no support in empirical data. Quite simply, these economic theories are based on how the prior administration would have liked the market to behave rather than on the realities of the market itself.

We strongly believe in the rights of the consumer. We believe that it is important for you to understand our industry and why we have decided it is imperative to oppose the weakening of the antitrust laws prohibiting RPM.

A PERSPECTIVE ON THE RETAILING INDUSTRY

Retailing is a diverse, dynamic, constantly changing and developing industry. It responds and adapts to changes in the economy, in technology and in society. Department stores, specialty stores, variety stores, discount stores, catalog stores, off-price stores -- all represent innovations in merchandising that arose to meet consumer demand and to offer their own special combination of competitive advantages, among them price, selection, location, hours, convenience and availability of credit.

Our industry believes that continued efforts by the Justice Department and the FTC to undermine the prohibition against RPM have exposed price competitive retailers, large and small alike, to ever-increasing anticompetitive pressure.

THE KEYSTONE MARKUP

To appreciate the importance of the proposed legislation, it is necessary to understand a few simple realities of the market-place. Traditionally, department and specialty stores have charged the so-called "Keystone" markup when retailing apparel. Keystoning consists of, quite simply, charging the consumer at least twice the cost of the merchandise. Retailers such as Burlington have achieved success by offering full lines of in-season, branded merchandise at prices considerably below the keystone markup. At Burlington, we follow the practice of offering the merchandise at 25 percent below the traditional markup, which I add, is generally the manufacturer's suggested retail price. We have been able to achieve profitable operations at this markup because we are more efficient or cost effective than full-price retailers.

Needless to say, our ability to profitably sell merchandise at such low prices to the consumer has not been welcomed by our full-price competitors and some clothing manufacturers. To fully appreciate the need for the pending legislation, it is necessary to clear up one misconception which many have expressed when talking about RPM. Many persons, especially those who argue in favor of doing away with the RPM prohibition, almost invariably discuss resale price-fixing in the context of a manufacturer attempting to fix the resale prices of its merchandise. Clearly, there are many manufacturers who now or in the past have attempted to do this.

ATTEMPTS TO ELIMINATE PRICE COMPETITION

In our experience, most efforts to eliminate price competition originate not with the manufacturer but with the full-price retailers who would prefer not to compete with Burlington's low resale prices. It stands to reason that a retailer who, for generations, has comfortably charged Keystone will be less than pleased when confronted with a retailer who offers the same merchandise for 25 percent less. To meet such competition, I understand the antitrust laws to encourage the full-price retailer to become more efficient and thus to price its goods competitively. Unfortunately, many entrenched, full-priced retailers have determined to interfere with the off-price merchant's source of supply, rather than to meet such competition fairly.

In our experience, the single greatest threat to price competition in the apparel industry is the pressure brought by full-price retailers on manufacturers to curtail business with value-oriented retailers. Although some manufacturers attempt to maintain the retail prices of their merchandise, in our experience, the overwhelming majority are only too happy to sell to our industry because we pay the full, wholesale price on time, we move our merchandise faster thereby enhancing the manufac- turer's profit. We have many excellent relationships with manufacturers which have lasted for years and were only jeopardized after the manufacturer had been pressured or threatened by a full-price retailer either to cease doing business with Burlington or to risk the loss of all sales to the department store chain. If a department store chain is powerful enough, the manufacturer will, however reluctantly, give in to such pressure or threats and terminate its business with off-price merchants.

The result is almost self-evident: off-price merchants are eliminated in a given trade area with the result that the only place the consumer can go to buy the product is at a department or specialty store which charges the keystone markup. Therefore, where sales to a value-oriented retailer are cut off at the behest of a full-price retailer, the elimination of price competition is obvious.

FORMS OF VERTICAL PRICE FIXING

In order for the committee to appreciate the various forms which such anticompetitive activities take, I will cite a few instances in which Burlington Coat Factory has been a target of pressure. On several occasions, economically powerful full price retailers in the mid-west attempted to pressure a women's sportswear supplier not to sell to Burlington Coat Factory at several midwestern locations. To avoid jeopardizing the account, Burlington Coat Factory removed the manufacturer's goods from the stores in question.

More damaging to Burlington was a situation in the South where a huge full price chain persuaded a men's wear manufacturer to cut off Burlington Coat Factory in its trade area. The manufacturer not only cut off Burlington Coat Factory in the South, it terminated sales to all of Burlington's locations. In another instance, an active-wear manufacturer told Burlington that, because of pressure from department stores, it wanted Burlington to raise its retail prices. To avoid losing the line -- which was totally irreplaceable -- Burlington reluctantly agreed to charge keystone (or 100% markup). When Burlington priced below keystone, the manufacturer terminated sales.

More recently a representative of one of the nation's most successful sportswear lines instructed Burlington to remove all goods bearing his company's labels from our stores in the Dallas, Texas area. He bluntly told me that this demand was being made because three full-price department stores had threatened him with the loss of their business if Burlington continued to sell this brand in Dallas. He went on to threaten me with the nationwide loss of all of his company's business if Burlington did not remove the goods from the Dallas vicinity stores immediately. Rather than jeopardize this crucial account, I directed that the merchandise be removed from the floors of our Dallas area stores.

POST SHARP AND MONSANTO RESULTS ON THE MARKETPLACE

I am truly appalled at the drastic changes in legal advice I have received from Burlington's lawyers over the past decade. Ten years ago, legal counsel advised me that there was no question that coerced activity which undermines price competition was a per se violation of the antitrust laws. By 1982, the advice was not so clear. Around that time, attorneys began to tell me that various federal courts were raising a serious question as to whether or not the law would protect a company (such as Burlington) if its access to essential merchandise was interrupted by such coerced activities. Moreover, various government officials, who were supposedly sworn to uphold the anti-trust laws, were beginning to maintain that the kind of anti-competitive activity which was rampant in the market might not be illegal.

Matters took a decisive turn for the worse in 1984 with the advent of the Monsanto case. I remember being told at that time by Burlington's lawyers that it was now impossible to predict just what improper activities would result in liability and which ones would result in the defendants escaping any legal consequences.

Between 1984 and 1988, an almost endless series of lower court decisions interpreted Monsanto, not only to deprive plaintiff of ultimate success in antitrust actions, but also to prevent such cases from even getting to a jury.

For example, in the case of Garment District v. Belk, the court actually found that the only reason the plaintiff discounter was terminated was that the manufacturer was economically coerced to do so by the threats of a giant department store chain. The coerced agreement to terminate the discounter was actually recited in a "smoking gun" letter which defendants unsuccessfully attempted to destroy. Nevertheless, in apparent reliance on Monsanto, the trial court dismissed the case without jury determination.

Almost as bad as Garment District was the case of McCabe v. La-Z-Boy. There, too, a discounter had been terminated as a direct result of competitive pressure by a full-price retailer. Indeed, the court found that there was a conspiracy to terminate the discounter but determined that it was not a price-fixing conspiracy in per se violation of the law because, under the evidence, some of the pressure had to do with price and some had to do with other aspects of the discounter's business. The Court stated that, since it was not a price-fixing agreement, it was subject to the "rule of reason". Burlington's attorneys have told me that they know of no case where a plaintiff has ever won a "rule of reason" case in circumstances such as are now under discussion.

An additional Circuit Court case which caused us great concern at the time was Business Electronics Corporation v. Sharp. The Sharp Court held that it was not a price-fixing agreement to agree to terminate a discounter because of his discounting unless the conspirators also agreed to charge specific prices or use specific price levels.

This result -- which is completely absurd to anyone who has ever been a businessman -- was disturbing enough as a Fifth Circuit opinion. Unfortunately, the Sharp decision is now the law of the land. In May of 1988, the United States Supreme Court affirmed the determination of the Circuit Court in Sharp and wrote an extensive opinion which has eliminated any possibility of a plaintiff recovering in a Monsanto type case.

Thus, when my attorneys told me that Monsanto was an unfortunate development in the law and that it was uncertain where Monsanto would lead, they were greatly understating the case. In fact, Sharp presents a reinterpretation of the antitrust laws which goes further than even the most pessimistic predictions following the Monsanto case.

It will be recalled that in Monsanto the Court held that if a discounter were terminated "in response to" the complaints of a full-price retailer, no price-fixing agreement would be inferable unless the plaintiff were able to disprove the defendant's evidence that their termination was unilateral. As I advised this Committee at that time, this language from Monsanto had been interpreted to create a very difficult and, in many cases, impossible burden of proof for the plaintiff. But, Monsanto at least left open the possibility that a plaintiff could prove a price-fixing agreement by presenting evidence that a termination was caused by price complaints and that there was no evidence of unilateral conduct. In short, as difficult as proving such a case would have been, there was no doubt that under Monsanto, a price-fixing conspiracy existed if the price complaints actually caused their termination and defendant had no evidence of unilateral motivation.

Even this limited basis for a plaintiff achieving success disappeared entirely with the arrival of the Sharp decision. (Interestingly, Sharp was written by Justice Scalia, whereas Monsanto was the work of Justice Powell, who has since left the Court.)

My lawyers tell me that the majority of the Supreme Court in Sharp has ruled that it is not a price-fixing agreement for a full-price retailer to strong-arm its manufacturer into agreeing to terminate a discount retailer because of its discounting. In Sharp, the Court treated the evidence as showing an actual, coerced conspiracy by a full-price Sharp distributor and the manufacturer to eliminate the only discounter of Sharp merchandise in the City of Houston. The full-price retailer always charged Sharp's suggested retail prices, whereas the plaintiff was always significantly below suggested retail price.

It is obvious to any businessman and ought to be obvious to any literate person that the direct, intended and foreseeable result of eliminating the only discounting retailer in a market will be the stabilization of retail prices at or about suggested retail (or, in the apparel business, keystone), a result which is price-fixing by any meaningful definition of the term.

But Justice Scalia was apparently not interested in what the actual effect of such activity would be in the market. He stated, in effect, that it is not a price-fixing agreement to agree to terminate a discounter solely for the purpose of eliminating its price competition even if prices are thereafter stabilized. According to Justice Scalia, price-fixing only occurs if, in addition to eliminating the discounter, the defendants also agree to charge certain prices or sell at certain price levels.

By requiring this additional element of proof, Justice Scalia has eliminated the possibility of a plaintiff winning, even if all the evidence required by Monsanto were presented. He has also shown that he failed to consider how businessmen actually act in the real world.

As stated above, if the only discounter in an area is eliminated because of his discounting, prices are fixed at the prevailing markup. There is no need for businessmen to make the statement, and indeed no businessman would waste his time stating, that "after we get rid of the discounter, we will only charge keystone or suggested resale price". Such an agreement is implicit in the entire activity of getting rid of the discounter in the first place. Everyone except the discounter wants to charge the same high prices. Once the discounter is gone, everyone in the market will adhere to the prevailing markup without having to agree to do so.

Justice Scalia, ignoring reality, says that such an agreed termination is not a price-fixing agreement but merely a conspiracy which is subject to the "rule of reason". My lawyers tell me that for a plaintiff to show a violation of the "rule of reason" under the antitrust laws, the plaintiff must prove that there was a substantial injury to competition as a whole within a certain market. Because there are generally numerous other brands of a particular item and numerous other retailers, the Courts are unlikely to find that the loss of one line to one retailer is sufficient disruption of the market to satisfy the onerous "rule of reason". In short, saying that such acts are covered by the "rule of reason" is to say they are legal.

The fact that the ""rule of reason"" cannot be satisfied in a particular case does not mean that competition is not being gravely undermined. One hundred discounters could be eliminated from a market by coerced agreements. Each such discounter would lose its case under the "rule of reason" because the injury to each plaintiff would be a small portion of the overall market. But the aggregate impact of the loss of 100 discounters -- which would not be in evidence in any one case -- would have a devastating effect on competition as a whole, and which would escape sanction under the antitrust laws.

In short, Sharp creates an impossible burden for price-fixing victims. To invoke the *per se* rule, plaintiff would have to prove that two businessmen did something they would have no reason to do, *i.e.*, that they agreed not only to eliminate the only low price merchant in the market, but also to charge the regular prices already enforced. (Even if such an unlikely agreement ever happened, it could not be proven without a tape recording.) Without such proof, plaintiff would be reduced to trying to satisfy the "rule of reason", an impossible burden.

LETTER PRESSES FOR TERMINATION OF DISCOUNTERS

The direct impact on the marketplace by even these pre-Sharp decisions can readily be seen by the attached letter (dated September 18, 1986) which was sent by the Youth Fashion Guild to its members. The Youth Fashion Guild is a buying co-op for approximately 200 businesses which range in size from one to forty stores. As a buying co-op, Youth Fashion Guild can exercise influence on manufacturers and distributors due to the economic power of its members in the aggregate.

Please note the specific paragraph which states:

> "It will be interesting to see the outcome of this unfortunate battle of the giants. As a result of the Supreme Court ruling on the "Monsanto Case", which stated that a manufacturer was a Free Agent and could arbitrarily determine to whom he would sell his product, unless proof existed that he was coerced into making that decision by another interested party, any manufacturer can now control the distribution of his own products. So, whenever a salesman or a manufacturer tells you that he is legally forced to continue selling to a discounter who has had previous access to his line, you can tell them that they are talking through their hats - however - do not use

threats to force them to discontinue the sale of their product to anyone. It is *your privilege* and right to refuse to buy any line that is peddled to a discounter, but under no circumstances should you say "its either them or me!"

Obviously, the letter demonstrated the direction the marketplace was taking before *Sharp*. Since *Sharp*, it has developed into an anticompetitive slugfest rather than the traditional free and open marketplace with intense competition which has been the cornerstone of our economic system.

Now, under *Sharp*, and other cases, they can now send the exact same letter and tell their members that it is all right to say "it's either them or me".

It is important to reiterate that manufacturers are being adversely affected, "...whenever a salesman or a manufacturer tells you he is legally forced to continue selling to discounters who have had previous access to his line, you can tell them that they are talking through their hat..." Whatever happened to the right of a manufacturer to be able to choose with whom they want to do business?

Generally, manufacturers are interested in selling their goods to as many retailers as possible. This, too, is traditional marketplace behavior. However, due to Sharp and other cases, the manufacturers are losing their rights in the marketplace. They are no longer always in a position to make unilateral business decisions as guaranteed under the "Colgate Doctrine".

Advocates of high prices have become even bolder since Sharp. According to the February 6, 1989, Home Furnishings News, Thomas L. Phillips, (Chief Executive Officer of Raytheon), publicly called upon all of his competitors to join with Raytheon to raise prices by 6 to 7% in 1989. He actually stated: "If all of us raise prices, the bottom won't fall out of the market. I think the consumer will pay." Exactly: if there is no price competition, the consumer will have no choice but to pay higher prices. Mr. Phillips' blunt comment -- "Consumers got away with murder" -- reveals that his attitude towards consumers belongs in the age of the "robber barons".

In direct response to Phillip's announcement, an executive of Maytag expressed his whole-hearted support for Raytheon's suggestion.

Burlington's attorneys tell me that, until recently, antitrust lawyers have always advised their clients to avoid even the appearance of co-operation about price with their competitors.

Since Sharp and Monsanto, antitrust lawyers have stopped giving such advice. This has now become the rule rather than the exception.

On January 18, 1989, the New York Attorney general announced he had reached a settlement of a vertical price-fixing case against Panasonic. Panasonic was forced to pay $16 million to compensate for the huge sum it owed for charging artificially high prices pursuant to the price-fixing scheme. Panasonic's nationwide price-fixing conspiracy might never have taken place if it were not for the permissive climate created by the prior administration and the Judiciary. I wonder how the gurus of the Chicago School will try to explain how Panasonic's outrageous price-fixing scam actually benefitted the consumer.

THE LEGISLATION ADDRESSES DIFFICULTIES FACING PLAINTIFF

Sharp and all of the other cases mentioned above would have been decided differently if the proposed legislation had been in effect. It seems to me that the proposed legislation is simply a restatement of several general principles of antitrust law which were unquestioned until MONSANTO. In the first place, it has always been the law that conspiracies can result from economic coercion. THE GARMENT DISTRICT Court found economic coercion but thought that MONSANTO stood for the proposition that economic coercion could not result in a conspiracy. This misapprehension would not have occurred if the pending measure had been passed.

As I read it, it permits a jury determination as to whether a conspiracy exists, wherever a discounter is cut off in response to complaints about discounting. If complaints about discounting could lead to a jury trial, surely the kind of economic duress present in THE GARMENT DISTRICT case would be sufficient to create a conspiracy.

The pending legislation would also dispose of the illogical results in the SHARP and LA-Z-BOY cases. Consistent with traditional antitrust analysis, a price-fixing agreement could be inferred under the proposed measure simply from the fact that the complaints concern discounting and that the termination resulted from the complaints. This would change the result in SHARP, which holds that prices are not fixed by the elimination of a discounter unless the parties additionally sit down and agree on specific prices or price levels. Likewise, the legislation would do away with the erroneous notion of the LA-Z-BOY Court that economic duress consisting of price complaints and non-price complaints cannot be a basis for inferring a price-fixing conspiracy, so long as defendant claims that price was not determinitive of the termination.

I expect that lobbyists for full-price retailers will oppose this measure by arguing that it will result in numerous jury trials of meritless litigations. Such an argument cannot be maintained in good faith. Even if the measure is passed, the plaintiff still has an extraordinarily heavy burden of proof. It must prove that a competitor complained about its prices to the manufacturer and that the cut-off was in response to those complaints. The manufacturer remains free to offer evidence that the complaints did not cause the termination and that it occurred for some other legitimate reason such as the manufacturer's concern for its image. Our system of government assumes that a jury is competent to review the evidence and determine the true motivation of a party.

Even with the legislation, it will remain difficult for the plaintiff to make out a case for an additional reason. It would be naive to assume that either the manufacturer or the full-price retailer will admit that complaints about pricing occurred.

In the face of an antitrust suit, many persons have been known to have selective memories, particularly about communications which could result in a substantial judgment against them. Thus, for a plaintiff to even commence a case, it must have substantial circumstantial or direct evidence that a complaint occurred at all, that the complaint was about pricing, and that the termination was in response to the complaint.

THE GARMENT DISTRICT case illustrates how difficult it is to prove this sequence of events. There, the manufacturer actually reduced the agreement to writing and sent it to the full-price retailer. Upon receipt, the full-price retailer directed all concerned to destroy every copy of the letter. The letter would never have seen the light of day if a former employee of the manufacturer had not retained a copy. Thus, any contention that passage of this bill will result in a flood of strike suits and meritless litigation must be rejected out of hand.

Another post-MONSANTO problem which the legislation will address is the difficulty which a plaintiff has in obtaining his constitutional right to a jury trial in an antitrust case. As a non-lawyer, I had always assumed that a litigant had the right to trial by jury. I am informed that, since MONSANTO, many courts have interpreted MONSANTO in such a way as to do away with jury determination in most cases. Indeed, in Sharp, Justice Scalia went so far as to question allowing juries to determine antitrust cases. I was under the impression that the Constitution guaranteed the right to a trial by jury and I think that guarantee ought to be honored.

In the three cases I have already discussed, the final decision was made by a judge or judges rather than by a jury. (In THE GARMENT DISTRICT, the Court granted directed verdicts to the defendants and in LA-Z-BOY and SHARP, the Court overruled jury verdicts.) In numerous other cases, the Court has entered "Summary Judgment" before the trial has commenced.

My attorneys advise me that in some cases it is appropriate to dismiss an action without trial by jury. These are cases where the plaintiff has no evidence from which a reasonable jury could find in its favor. However, The Sharp decision will deprive the plaintiff of a jury trial, despite the existence of evidence which traditionally would be more than sufficient to permit the case to go to a jury.

I bring to the attention of the Committee that, during the last Congress, eminent antitrust experts, Robert Pitofsky, (former Dean of Georgetown Law School), and Harry First, (Professor of Law, New York University School of Law), provided Congress with their analysis of legislation introduced during that session. They completely debunked the various legal and "manufacturers' rights" concerns raised by the opposition.

Pitofsky stated that the argument of the legislation inducing frivolous litigation was itself is frivolous.

Professor First discounted the opposition's arguments that the legislation "will prevent manufacturers from terminating distributors who do not do a good job, or will prevent manufacturers from requiring distributors to provide a certain level of service. This argument is incorrect".

ISSUE OF AMBIGUOUS EVIDENCE

Relative to the jury issue, the Supreme Court in MONSANTO had expressed disapproval of awarding antitrust judgments on the basis of "ambiguous evidence". Thus, where the plaintiff presents circumstantial evidence indicating that a termination occurred pursuant to a conspiracy and the defendants have denied that the conspiracy occurred, several courts have granted summary judgment or a directed verdict simply because they found the evidence to be "ambiguous" within their interpretation of MONSANTO.

Speaking as a layman, it is my understanding that most circumstantial evidence is ambiguous. I doubt very much that the Supreme Court intended MONSANTO to result in the dismissal of all cases simply because the evidence is arguably ambiguous. It is the traditional function of the jury to interpret the evidence, even where some of it is ambiguous. I understand that the proposed measure would ensure a jury trial except in those cases where the evidence is so ambiguous that no reasonable jury could decide the case in favor of the plaintiff. I believe this would be consistent with the Supreme Court's true intention in delivering the MONSANTO opinion and at the same time restore the jury trial to its traditional function.

"FREE RIDER" ARGUMENT

MONSANTO involved the distribution of a sophisticated herbicide which, to be properly implemented, required complicated and costly service programs. The Court noted that in the herbicide field, there was the so-called "Free Rider" problem which would inevitably lead to innocent complaints about discounters. It was understandable, in the Court's view, that Monsanto's herbicide dealers who absorbed the cost of providing sophisticated services would complain about being undersold by dealers who did not provide such services. This may very well make sense in high technology fields, but it has no application to the garment business, where no costly services are necessary or required by the manufacturer. Self-evidently, a purchaser of clothing does not need training in how to wear it.

In fact, it seems to me that the entire "Free Rider" concept has been misunderstood, even high tech fields. Under the Sylvania case, a manufacturer may, by contract require point-of-sale service, display, etc. If a distributor fails to provide such service, a manufacturer has entirely adequate remedies under the law of contract. Why the maintenance of high resale prices are needed to effectuate such distributional programs is a mystery to me.

The new measure would not eliminate the "Free Rider" argument in cases involving industries where the free rider is actually a problem. Nothing in the legislation precludes a manufacturer from offering evidence that the termination was motivated by an appropriate distributional concern -- such as free riding. If a plaintiff proceeding under the new law offers evidence of price complaints followed by a termination, the manufacturer can offer evidence that the plaintiff was a free rider and was terminated for that reason. It will be for the jury to determine which version of the facts is true. Of course, in industries such as the apparel industry, where there is no free rider problem, the manufacturer may nevertheless be able to persuade the jury that it acted properly on the basis of some other explanation for the termination.

Indeed, it appears that, if there is a "Free Rider" problem in the apparel business, it is caused not by the discounter but rather by the full price retailers. Full price retailers _do not_ create a name or image for a particular product. The manufacturer and designer initially market the product to develop the name brand before it is associated with specific retailers. Full price retailers generally are given an allowance of approximately 40-50% by the manufacturer to advertise their product. Whereas, in nearly every case, discounters are not allowed to advertise the manufacturer's products by name and do not get an advertising allowance. Who, then, is the "Free Rider"?

In any event, the "free rider problem" is not an excuse for price-fixing. Passage of this bill will lay to rest any lingering notion that price-fixing might be justified on the basis of some variant of the "free rider" argument.

CONCLUSION

I believe that this legislation, to clarify the MONSANTO evidentiary standard and overrule *Sharp*, would, if passed, result in many more meritorious cases reaching the jury. More importantly, the new statute is likely to deter full price retailers from engaging in anticompetitive pressure tactics in the first place. By removing any doubt as to legality of price complaints, the measure may very well result in a decrease in antitrust litigation. I believe that S. 865 is of the utmost importance.

I submit that the recent court decisions referred to are emasculating the antitrust laws and are resulting in greatly increased vertical price-fixing. For all practical purposes, they will eliminate any effort by businesses such as Burlington Coat Factory to obtain redress and are leaving many small businesses virtually defenseless.

We would like to commend the efforts of Senators Metzenbaum, Rudman, Bradley, Gorton, Simon, Wilson and Members of the Committee.

Thank you, very much, Mr. Chairman and Members of the Committee, for giving me the opportunity today to address you on behalf of our industry. It is a pleasure to be able to speak in behalf of a measure that will help bring about positive results for retailers, consumers and manufacturers alike.

IMPORTANT INFORMATION

September 18, 1986

AS I SEE IT FROM MY DESK . . . .—

R. H. Macy and Bamberger's (the latter name will shortly be changed to Macy) have embarked on a newspaper campaign, running full page ads on children's wear, with headlines that read:

> "OUR CHILDREN'S PRICES ARE THE LOWEST"
> "OUR PRICING POLICY IS STRAIGHT FORWARD WITH NO GIMMICKS"
>
> "WE WILL NOT BE UNDERSOLD BY KIDS SPECIALTY STORES!"

It should be obvious that the Kids Specialty Stores they are referring to are not your store or any other independent specialty store. I am certain that everyone reading their ad knows the name of the children's specialty chain which they mean.

If Macy's have taken this approach, it will not be long before other major department store groups whose territory is now being invaded by the "KIDS SPECIALTY STORES" will adopt the same technique. The gauntlet has now been thrown down and the battle royal for dominance will be a bloody one.

Many of the vendors who have been playing both sides against the middle will now start to feel the pressure and demands for markdown money, return privileges and special price concessions and will have to do some soul-searching and decision making.

MGM

It will be interesting to see the outcome of this unfortunate battle of the giants. As a result of the Supreme Court ruling on the "Monsanto Case", which stated that a manufacturer was a Free Agent and could arbitrarily determine to whom he would sell his product, unless proof existed that he was coerced into making that decision by another interested party, any manufacturer can now control the distribution of his own products. So, whenever a salesman or a manufacturer tells you that he is legally forced to continue selling a discounter who has had previous access to his line, you can tell them that they are talking through their hats - however - do not use threats to force them to discontinue the sale of their product to anyone. It is your privilege and right to refuse to buy any line that is peddled to a discounter, but under no circumstances should you say "its either them or me!"

I seriously believe that the Independent Retailer must now face up to reality. It is only a question of time before those of you who are not already faced with the cutthroat competition of the discounters, will soon find the brand names you have built up, being discounted at 25 to 30 percent below your prices, as these discounters invade your territory.

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Raytheon exec seeks price hike

Asks 6% to 7% industrywide major appliance increase

BY GERRY BEATTY
AND PETER LEWINE

NEW YORK — Thomas L. Phillips is calling for a price increase of 6 percent to 7 percent by major appliance manufacturers — and he thinks the public will buy it.

Phillips is the chairman and chief executive officer of Raytheon Corp., the parent of such companies as Amana, Caloric and Speed Queen. He told a luncheon meeting of the New York Society of Security Analysts here last week his firm is a niche player that can't lead the way on needed price hikes, and called on the industry's leaders to do so.

"The price of all basic metals in '88 went up substantially," said the executive. "No one raised prices. Consumers got away with murder.

"Finally, GE late in the year raised prices a meager 3 percent. We were there the first day" to do the same — but "the leaders (GE and Whirlpool) have to wise up."

Most of the leading companies in the business disclosed increases in late summer and early fall, usually 3 percent to 5 percent, effective at the end of the year. GE Appliances' Bruce Enders, for one, has spoken of further price hikes this quarter.

Undoubtedly that would satisfy Phillips. "We're not the market leader," declared the Raytheon executive. "If we take the lead, we'll lose market share."

Phillips minimized the year-end AHAM data (see below) showing a slight decline in shipments for 1988 and a prediction of less volume in 1989. "If all of us raise prices," he said, "the bottom won't fall out of the market. I think the consumer will pay."

The chairman also said that Raytheon's interest in acquisitions for its non-government operations does not extend to the globalization of major appliances. "Not at this time," he told HFD after the meeting. "We think there is enough for us to do in the domestic market."

Nor would Raytheon spin off any appliances firms. Strategically, he said, "we're the top of the line. We have to make sure that Amana (which he reported gained 18 percent in sales last year "and very good market penetration") at least is a full-line player."

Speed Queen, said Phillips, is supplying Amana-brand laundry products and Caloric a cooking line. "We can't divest without hurting the full line," he said in response to a question from the audience.

In his prepared text, the head of the Lexington, Mass., company noted growing sales and shrinking profits in 1988 for appliances "because of start-up costs on new products, significant higher material costs and very stiff price competition. The industry did not pass onto the consumer these price increases," he ad libbed.

He also mentioned Caloric's "state-of-the-art" plant under construction in Florence, S.C.

Phillips' appearance before the analysts followed within a week the year-end financial statements

*(See **RAYTHEON**, page 119)*

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from GE, Whirlpool and Raytheon. Predictably, all reported increased sales and decreased profits for major appliances — and blamed higher materials costs that weren't recovered through higher prices.

The results gave added weight to predictions that more price hikes are on the way, quite possibly before the end of 1989's first quarter.

GE reported higher corporate earnings and sales for 1988. The fourth quarter was GE's first in which sales exceeded $1 billion dollars.

But for GE Appliances, operating profit was down sharply in 1988. A GE spokesman said exact number for individual GE businesses would not be available until the 1988 annual report is issued. In a statement from GE, the lower profit was blamed "largely (on) provisions for abnormally high warranty expense accruals for certain refrigerator compressors. The compressor problem," the GE statement continued, "has been corrected in currently manufactured products."

Business Week magazine reported that GE's move to rotary compressors for a new line of refrigerators could result in "a writeoff of $350 million or more." No comment was immediately available from GE.

In Benton Harbor, Mich., Whirlpool chairman David Whitwam also reported lower earnings for 1988. Whirlpool reported net sales rose 4.9 percent. But earnings for the year fell 13.6 percent. According to Whitwam, the lower earnings can in part be attributed to higher material costs not recovered through increased pricing.

Whirlpool also revealed that the previously disclosed decision to sell the company's kitchen-cabinet business resulted in a 1988 after-tax loss of $45 million.

In Whirlpool's earnings statement, Whitwam was quoted as expecting 1989 to be another difficult year for the industry. "We expect the highly competitive environment of the U.S. major appliance industry to persist through 1989," Whitwam said, "with (industrywide) sales of the nine major-appliance (categories) to dealers dropping approximately 4 to 6 percent compared to 1988."

The year was "challenging" for Whirlpool, Whitwam continued. "We have taken aggressive steps to enhance our marketplace position and believe that our performance in 1989 will improve."

At Raytheon, corporate earnings increased 10 percent, to $489.6 million from $445.1 million. Sales gained 7 percent, to $8.192 billion from $7.659 billion. Both set records.

The company's electronics business, especially missile systems, was strong, and such other divisions as aircraft products outpaced major appliances.

Major Appliances/Floor Care

PHOTO: [illegible]

Leonard Hadley, left, & Daniel Krumm addresses security analysts.

Maytag's Krumm calls for price hikes

Backs Raytheon; cites materials costs

By Peter Lewine

NEW YORK — Speaking before securities analysts here, the chairman of Maytag Corp. said he supports the call for higher major appliance prices issued recently by the chairman of Raytheon Corp., the parent company of such brands as Caloric, Amana and Speed Queen. Complaining about rising raw materials costs, Raytheon's chairman, Thomas L. Phillips, in late January called for price hikes of 6 to 7 percent. In his remarks, Phillips called his company only a niche player that couldn't lead the way on needed price hikes. He called on industry leaders to take the lead in raising prices.

Maytag's chairman, Daniel J. Krumm, said he "was cheered" by Phillips' remarks, saying, "I think he was really calling on Whirlpool and GE to take the lead, and I think he's exactly right, and I think we will be seeing that."

But did Daniel Krumm find it unusual for the head of one major manufacturer to publicly urge competitors to lead the whole industry in raising prices together? Not at all, answered Krumm, instead, with a big smile, calling Phillips' remarks "statesmanlike."

Krumm went on to explain that while Maytag Corp. would like to see price hikes throughout the corporation, after Maytag brand, he said, it's hard to make price hikes stick. "Maytag brand over the years, we've always been very aggressive about taking price increases, and have had considerable success at that, and that's the reason our margins have consistently always been higher. That's not as easy to do, for instance, with a Magic Chef brand, because it's sold differently, but we're taking price increases there, too, and I think you'll see it throughout the industry this year."

Krumm later told HFD he did not want to be specific about how large price hikes might be, but he did say, "Our budgeting for 1989 has price increases for all of our product lines. We intend to go forward with it, but I don't care to say when they are or anything like that. And, of course, it will depend to some extent on how business unfolds and what happens to costs."

At the meeting with security analysts, Maytag's chief financial officer, Jerry Schiller, said that raw material cost hikes, especially in plastics and steel, were [illegible] along with the rate of inflation dropping from 7 percent in 1988, to perhaps 5 percent or less in 1989.

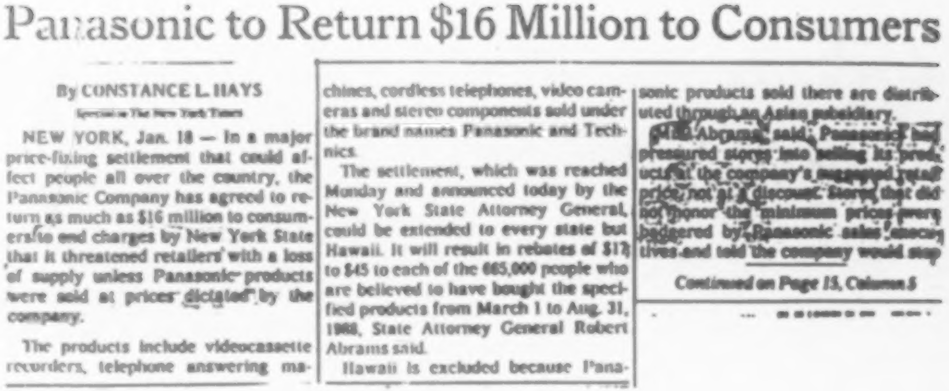
Whirlpool declined to comment on the call by Raytheon and Maytag for GE and Whirlpool to take the lead in raising prices. A spokesman at GE Appliances had the following reaction: "GE makes its pricing decisions independently, based upon its own assessment of the factors operating in the marketplace. Accordingly, it would not be appropriate for us to comment on any pricing statements attributed to our competitors."

However, in an interview in December, Bruce Enders, vice president for product management and marketing at GE Appliances, told HFD he expected GE Appliances would raise prices, to keep up with materials costs, in the second quarter of 1989, probably in the 4 to 5 percent range.

As for a prediction for 1989 and the major appliance industry, Krumm pointed to rising interest rates and "very high" consumer debt, and predicted that, overall, major appliance sales for 1989 will decline about 5 percent in the United States, though he predicted that Maytag would do better than that.

During his speech to analysts, Krumm also said Maytag Corp. was committed to developing "a meaningful presence in the global appliance market while we continue to strengthen our domestic appliance and vending machine business." He pledged to focus every aspect of the company on quality, and said, "We have set our sights on the long term."

At the same meeting, Maytag Co.'s president, Leonard Hadley, gave an update on the all new, high-end Maytag refrigerator line, Maytag's first since the 1950s. The line will be introduced at the National Kitchen & Bath Show in Dallas at the beginning of April. It will be a full line of refrigerators, Hadley said, with both top mount and side by side models. Presentations to dealers will begin in early April, and shipments to dealers will begin at about the same time.



Panasonic to Return $16 Million to Consumers

By CONSTANCE L. HAYS

Special to The New York Times

NEW YORK, Jan. 18 — In a major price-fixing settlement that could affect people all over the country, the Panasonic Company has agreed to return as much as $16 million to consumers to end charges by New York State that it threatened retailers with a loss of supply unless Panasonic products were sold at prices dictated by the company.

The products include videocassette recorders, telephone answering machines, cordless telephones, video cameras and stereo components sold under the brand names Panasonic and Technics.

The settlement, which was reached Monday and announced today by the New York State Attorney General, could be extended to every state but Hawaii. It will result in rebates of $17 to $45 to each of the 665,000 people who are believed to have bought the specified products from March 1 to Aug. 31, 1988, State Attorney General Robert Abrams said.

Hawaii is excluded because Panasonic products sold there are distributed through an Asian subsidiary.

Mr. Abrams said Panasonic had pressured stores into selling its products at the company's suggested retail price, not at a discount. Stores that did not honor the minimum prices were badgered by Panasonic sales executives and told the company would stop

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Panasonic to Return $16 Million To Consumers in Pricing Dispute

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doing business with them if they did not cooperate, the Attorney General said.

The retailers included major stores and chains, like Circuit City, K Mart and Montgomery Ward, Mr. Abrams said.

Manufacturers often suggest prices to their retailers, but the retailers are supposed to be free to set their own prices, depending on the profit they foresee in their markets. "Any agreement between a manufacturer and a retailer to fix a price is illegal," Mr. Abrams said.

He said investigations into price-fixing by other electronics manufacturers were continuing, but no action is being taken against the retailers.

Mr. Abrams announced the settlement at a news conference at his office in Manhattan. He and members of his staff described the price-fixing as "nationwide in scope," complete with "stool pigeons" in the form of retailers who reported uncooperative competitors to the company.

A spokesman for Panasonic, William Pritchard, said the settlement was the first of its kind for the company in the 30 years that it has been doing business in the United States as a division of the Matsushita Electric Corporation of America. Panasonic agreed to pay at least $8.5 million in rebates and up to $16 million if necessary.

Consumer advocates and legal experts said it was difficult to compare vertical price-fixing settlements — those in which prices are set by manufacturers — since they often cover varying periods of time and may involve one person or a large group of people.

Other Big Awards Recalled

But the settlement announced today was said to be the largest involving cash awards since 1978, when the Levi Strauss Corporation agreed to rebates totaling $12.3 million in a case brought by the California Attorney General.

The last major Federal settlement involved a class-action suit against Cuisinarts Inc., and resulted in the distribution of half-price coupons in 1983 to 900,000 people who had bought the food processors. The coupons were for use in purchasing other Cuisinart products.

"The Federal Government has not brought a price-fixing case since 1981," said Michael Waldman, legislative director for Public Citizens' Congress Watch, a consumer-advocacy group in Washington. "What this really shows is that the antitrust law is alive and well at the state level, even though it has been scorned by Federal prosecutors."

Mr. Pritchard said the company's position was that it had done nothing illegal.

Denial by Panasonic

"We entered into the agreement denying charges of unlawful conduct, without admitting any liability, in the hopes that we would put this matter behind us and get on with business," he said from the company's headquarters in Secaucus, N.J. "We have always felt that our sales policies complied with the law."

"They questioned our policy of suggesting retail prices to dealers," he continued. "It was always our policy that whatever price was set was, quite frankly, up to them."

The policy may have been a byproduct of the strong Japanese yen, Mr. Abrams said. Complaints from Japanese consumers about the high prices of Japanese-made electronic goods in Japan, compared with prices in the United States for the same products, contributed to Panasonic management's decision to establish its price policy, Mr. Abrams said.

Continued Congressional unhappiness with lower prices for Japanese electronic products, which cut into the market for higher-priced American goods, may also have led to the action, he added.

The Panasonic policy was investigated after a large New York retailer, which Mr. Abrams refused to identify, complained about it to the Attorney General's office last August.

Under the policy, prices were raised on both wholesale and retail levels by between 5 and 10 percent, depending on the product, Mr. Abrams said.

"In a few short months, over $15 million was extracted from consumers," Mr. Abrams said.

About 83,000 New York customers of the dozens of stores affected by the pricing policy are expected to be reimbursed, Mr. Abrams said. Illinois and Maryland have joined the settlement, and other states are expected to join as well.

Under the agreement, either party may terminate it if 80 percent of the Panasonic consumers affected do not join it within 90 days.

Panasonic must also place advertisements telling consumers of the settlement.

The company will send claims forms to consumers who mailed in warranty cards for the affected products. In New York, people eligible for rebates will have to file the forms with the Attorney General's office, Mr. Abrams said. They will have four months to do so.

How to Obtain The Rebate

Consumers who purchased the affected models of Panasonic and Technics equipment between March 1 and Aug. 31, 1988, are eligible for rebates on the products, regardless of the price they paid. Panasonic will send claim forms to consumers who mailed the manufacturer's warranty card.

In New York, the forms are to be returned to the office of the State Attorney General. New York consumers who purchased the products but did not register them with the manufacturer must file proof of purchase with the Attorney General's office. Other states that participate in the agreement will set their own filing rules.

The claims process will begin within a month; claims must be filed within four months of that, and the company has two more months to mail the rebates.

These are model numbers and estimated size of the rebate involved in the settlement.

PANASONIC

VCR's

PV [illegible]; $19
PV 2812; $20
PV [illegible]; $22
PV 4820; $21
PV [illegible]; $26
PV 4862; $19

Camcorders

PV 400; $45
PV 420; $38
P[illegible]460; $30

Phone [illegible]

KXT 3000 telephone; $17
KXT 3800 telephone; $17
KXT 2429 answering machine; $18

TECHNICS

Audio Products

SA 180 stereo receiver; $18
SCA 830 rack system; $24
SCA 840 rack system; $30
SLP [illegible] compact-disk player; $18

Hubert B. Tolson, III

President

North Carolina Furniture Retailers Association

Written Testimony

presented at a hearing before the

Senate Judiciary Committee

Thursday June 1, 1989

Mr. Chairman, members of the committee, I am Hubert Tolson and I am here on behalf of the North Carolina Furniture Retailers, an association that represents furniture stores across the state like my own, Turner Tolson Furniture in New Bern, North Carolina.

As president of Turner Tolson, I am here to offer my support of S. 865, CONSUMER PROTECTION AGAINST PRICE FIXING ACT OF 1989, and appear before you today to provide testimony of its importance.

I would like to praise Chairman Metzenbaum and Senators Rudman, Simon, Gorton, Wilson and the fifteen other democrats and republicans who were the original cosponsors for introducing this bill.

For over 103 years, my family has operated a furniture store in North Carolina representing nearly all of the major manufacturers of high-end home furnishings. For 97 of those years, we operated as a full price retailer serving eastern North Carolina.

After years of low profits and virtually no growth, we decided to rethink our selling strategy. We reduced our prices, made efforts to streamline our business and found ways to cut our costs. For five years we lost money on a lower margin - waiting for our volume to grow.

All through this period we continued to provide consumers with the highest possible level of service. We paid our dues.

What we found in the long run was that consumers appreciated the opportunity to purchase fine furniture at competitive prices. What we also found was that high price retailers did not appreciate the competition.

They complained to manufacturers. And after a century of service to the industry, manufacturers were threatening our supplies because of these complaints.

They also began implementing restrictive policies that were designed to eliminate us as price competitors. They severely limited the ways we could do business if we were to continue as a dealer. They included:

a. Requiring retailers to sell at the retail price.

b. Prohibiting the retailer from offering toll-free telephone service to his customers.

c. Requiring that previous customers, and customers who visited our store but needed time to think over a purchase, must be physically present in our showroom to make the purchase - otherwise we could be terminated for selling to them.

d. Prohibiting the retailer from advertising outside this manufacturer-defined local area. Each manufacturer had assigned a different area - no two are the same. This is impossible to keep up with.

e. Prohibiting the retailer upon request by the customer from mailing the consumer brochures, catalogs (even photo copies that might include a picture or name of the manufacturer's product).

These were not suggestions... and they were not limited to one or two manufacturers. Their purpose was to force adherence to resale prices by use of these policies.

These restrictions appeared in the same time period, initially after the Monsanto decision, then snowballing immediately following Sharp. Failure to comply meant termination and, if one can no longer find supplies, one can no longer do business.

When a manufacturer is coerced by a full price retailer to terminate a discounter, competition is eliminated. Prices are fixed or rise to a higher level and the consumer pays the price. Indeed, what we are talking about today, is not only the right of the discounters to do business in America, but the rights of consumers to competitively shop the marketplace and choose their level of service.

It is this sort of competition that has forced some full-price retailers to provide a higher level of service and the best possible price. A recent article in Design Today took note of ways these retailers are finding to beat the discounters. The bottom line is that some are now finding ways to compete rather pushing manufacturers toward restraint of trade, to the benefit of all parties...the consumer, the retailer and the manufacturer.

I ask the committee to pay close attention to the quotes of the very merchants who compete with discounters.

Ben Willis, Jr., president of Willis Wayside Furniture in Virginia Beach, Virginia and Williamsburg, Virginia, says "It all boils down to the game of marketing. This where your skills as a merchant come in." The article goes on to state that Mr. Willis has "altered his merchandise mix, specialized in particular products, started private labeling goods, de-emphasizing case goods and offering lower prices than previously."

Dick Lewis, president of Adele Hunt Furniture in Dallas, Texas, states in the article, "If customers have had a bad experience with a local retailer, it's hard to blame them for going to an 800-number dealer."

This is a thought provoking statement. One might question where the consumer would be left if she is unhappy with the service of her local dealer.

Bill Brittan, president of three-store Brittan's Fine Furniture in Houston, Texas says that his company has become vastly more price competitive in an effort to meet the competition.

John Holeringer, president of Louisville, Kentucky based Holeringer's Furniture, has overhauled its customer service as a means to compete with 800-number merchants. We quote Mr. Holeringer: "We've also established a one week follow up deadline for any customer service problem, we tell customers that their problems will be solved at a maximum of one week from the time they first call us. And we're stressing these services in our advertising."

Another quote from this article offers insight and explains that high priced retailers' complaints reflect a lack of merchandizing skill and creativity:

"And when dealers are forced to sacrifice margins in casegoods in order to be more price competitive, they try to increase their volume in higher margin goods such as decorative accessories and upholstery. By merchandizing this way merchants are attempting to - and succeeding in - offsetting their losses."

"Already you're seeing discounters losing some of their price advantage because the full service retailer is getting more competitive," observes Ben Willis of Willis Wayside. "And you're seeing discounters beginning to offer more services to compete with us. Eventually, their overhead will increase and someone else will come along and undercut them. That's the way it goes."

Lastly, the article quotes Richard Fowler of Fowler's Furniture Plantation in Chattanooga, Tennessee and Leniar Chew, president of Oxford Galleries in Birmingham, Alabama. "Since instituting Carolina pricing a few years ago," Fowler says, "both volume and margins have increased. Margins have increased, because there are fewer clearance sales and because the increase in special orders has cut inventory and cost of sales." Furthermore, "word of mouth has become so powerful," he says, "the store could also cut advertising."

Oxford Galleries has found the average margin from the wholesale outlet and the regular high-end store have been reduced slightly, but that drop has been compensated for by increases in sales. "We make up for (lower margin) in higher volume, and inventory costs have been reduced so we can live with the lower margins." Chew goes on to say, "We recaptured a group of customers (the hardcore shoppers who look for price as a priority)."

Such evidence is unrefutable. If a manufacturer is allowed to restrict discounters in such a destructive manner, why would any retailer want to improve his level of service or lower the price?

As the debate over sales policy restrictions has heated up, high price retailers have attempted to paint discounters as people who operate in dark little rooms with phone banks and catalogs. They complain that we do not provide the same level of service to consumers; and that their higher overhead should be protected by restriction of free trade.

The "free rider" argument claims that discounters rely on the investment of others, making little investment themselves. Consumers, they claim, shop the full-price retailers and then place their orders with discounters.

Quite the opposite is true. Bill Kester, (of Rose Furniture in High Point, North Carolina) is quick to point out that such claims are grossly unfair. "My company has 102,000 square feet of showroom 133,000 square feet of warehouse, 200 employees, a large nationwide shipping organization and highly sophisticated computerized order tracking and customer service programs," says Kester.

Indeed, all the members of the North Carolina Furniture Retailers Association support tremendous showrooms and shipping facilities. If anything, the investment by most is far greater than required by companies outside North Carolina who do not discount.

Specifically, because North Carolina is seen as the furniture capital and nearly all discounters are located there, many price restrictive policies have been disguised as geographic in nature. For instance, in North Carolina, Pennsylvania House requires its dealers to install exclusive galleries with a minimum of 3,500 square feet. In many other areas, galleries are not required at all. Thomasville Furniture requires all North Carolina dealers to have 7,500 square foot exclusive galleries. Elsewhere, the minimum is 3,000 square feet.

In 1986, Turner Tolson, in agreement with Pennsylvania House, completed a gallery within our showroom to "showcase" their furniture in exclusive room-like settings. The expense to my company was several hundred thousand dollars. During the construction period, we continued to sell products nationwide with the full knowledge and cooperation of Pennsylvania House management. To offset the cost of this gallery, we followed the traditional route of lowering our prices to increase our volume and become established in the marketplace.

Full-price competitors, seeing the competition and fearing a loss of market share, complained to the manufacturer. Rather than competing on price, the full-price retailers went after our supply lines. In a matter of months Pennsylvania House terminated our supply and we never recouped our investment.

After building a business relationship for five years and constructing a space to better showcase the manufacturer's product and service the consumer, we were cut off for giving a price quote over the phone, even though we informed the caller that they had to come to our showroom to purchase the goods. This termination meant over a million dollars in lost business.

Despite these setbacks, we have increased our level of service to the consumer. Our own overhead includes a 36,000 square foot showroom. We have a customer service department staffed by full-time professionals and have implemented a program to pick up the tab for consumers from out-of state to visit our store for the weekend and shop with our interior designers. Even at this level of service, we have been able to provide the most competitive pricing in the industry.

Regardless of this attention to the consumer, manufacturers have been pressured to limit, and in some cases, cut off dealers of this type all across North

Carolina. In other industries, the scenario is the same. In many cases, businesses have gone bankrupt because of this.

Other members of our group report terminations after making large investments based on promises by manufacturers of a long and fruitful relationship. Coolidge Murrow, owner of Murrow Furniture Galleries in Wilmington, in agreement with Drexel Heritage Furniture, constructed a $750,000 gallery environment to exclusively house Drexel's products. Mr. Murrow had to physically add additional square footage to his existing building with new construction.

He built this gallery environment at Drexel's request to ensure a long and profitable relationship. However, immediately after completing the gallery, Mr. Murrow was told by Drexel that policy had changed.

He was told that since he offered his customers the service of toll free telephone calling he would not have access to any new products introduced by Drexel. What possible reason other than price could any manufacturer have for restricting the service offered to a customer by a retailer?

Additionally, Drexel Heritage told Mr. Murrow, as they have me and many other North Carolina discounters, that removal of Watts lines might result in reinstatement of new groups, but they weren't sure. They suggested that we remove our Watts lines and wait and see.

Several retailers have yielded to such tactics over recent years and universally, without exception, report massive impact on sales due to the removal of this important customer service and sales device.

Although his sales were significantly impacted, Mr. Murrow eventually received new Drexel Heritage groups. Other retailers who have eliminated toll free service Watts have not been given such access.

Control of the marketplace by a few large manufacturers through market power is squeezing mid-size and smaller manufacturers out of business and off of showroom floors.

For example, restrictions placed on North Carolina discounters only by three major manufacturers (regarding minimum display square footage requirements) would consume a minimum of 100% of the showroom space available to a large percentage of our members. These retailers currently represent between 150 and 200 manufacturers and serve their customers through variety as well as service and price. What is a discounter to do when, for decades, he has pushed the product of a select few manufacturers and created a high demand in the marketplace for these manufacturers products, when he finds himself faced with such a lose/lose position?

If he yields to the unreasonable demands of the large manufacturers at the exclusion of all the others, he removes variety from his offering to consumers. If he increases his overhead through construction of elaborate galleries, he eventually reduces his ability to discount. Additionally, he has trained his customer base to expect the brand name that for years he has created a demand for through aggressive marketing.

I ask the committee, who wins in such a situation. Surely not consumers; they either pay higher prices or have less selection. Surely not the discounter; his very existence is threatened. Certainly not the manufacturing workers; as product costs increase, the number of units produced decreases. When fewer units are built, factory workers are put out of work.

I sight the enclosed articles indicating plant closings, terminations, and related unemployment benefit effects of Thomasville Furniture Industries and Henredon Furniture, major players in this vertical restraint game.

An additional method of eliminating price competition is outright termination of discounters en masse. Recently, Priba Furniture of Greensboro, North Carolina, was terminated by several major suppliers within a thirty day period. In addition to loss of creditability and good will to consumers, it should be noted that these terminations cost Priba Furniture over 50% of their existing gross sales volume. Consumers who had begun investments with these companies are stuck.

In many cases a consumer will furnish his home over the course of many years. His plans are laid out and once initiated, he purchases according to financial ability, always working from this plan. Having begun purchasing furniture from a particular group, the consumer is locked into completing the project with products from this group. Departure from the specific group involved are visually obvious and undesirable.

The discounter has made and investment in this consumer by laying out such a long term plan and expects to recoup his investment over a long period of time. If the retailer's supply is terminated, his investment is never recouped. Additionally, customers become suspect of the credibility of these discounters due to such terminations.

The consumer then is forced to buy at a higher price from a dealer not of their choosing or to buy from a different group, thereby dramatically impacting the end result of the project, or doing without. This is a not a desirable set of choices for the consumer or the discounter.

Some of our members have spoken to manufacturers who admit they are being coerced by full-priced retailers who represent ninety percent of furniture retailing. They told us they would like to be able to go back to doing business with us like before. Passage of the legislation we have been told would be helpful to protecting them.

For 75 years, laws have been in place to deal with such restraint of trade. However, during the last decade, these safeguards have been ignored or redefined by the Federal

Trade Commission and the Justice Department.

In allowing this to occur under the guise of promoting fairer trade, government officials have essentially ensured a lack of competition and have raised prices to the detriment of the consumer.

S. 865 goes a long way in curtailing the problems and eliminating the confusion over what our forefathers had in mind when they set out years ago to make the market place free and competitive.

In recent years, unrealistic interpretation of the definition of price-fixing, has made proof of such a scheme an unreasonable task for plaintiffs. Recent rulings, stating that discounters must provide specific price-related documentation to insure a trial by jury, have provided manufacturers with the ability, and full-priced retailers the tools, to insure the termination of discounters without fear of reprisal.

The end result, when the discounters are eliminated, leaving only full-price merchandise, is fixed and higher prices.

Additionally, since implementing these terminations and restrictive policies, manufacturers have not hesitated to dramatically increase their wholesale prices, further raising the specter of inflation.

Manufacturers can claim that termination of supply to discounters is based on nebulous reasons other than price;

and discounters are hard pressed to find physical, acceptable proof otherwise.

It would be naive to assume that full-price retailers and manufacturers, in collusion, to restrict trade and fix prices, would leave a paper trail of documentation. Since *Sharp*, even hard documentation may not, in fact, allow a plaintiff to bring his case before a jury.

Reference should be made to implementation of "physical presence policies." These policies in themselves create local oligopolies and almost totally eliminate price competition. A good example is the implementation of such a policy by Thomasville Furniture Industries across the United States. Thomasville's policy states that a customer must stand physically present within the retailer's showroom to place an order for products.

If you as a consumer, go into a store, shop all day using the store's resources as well as your own time, and then leave to think over such an important purchase decision for the evening you would find that *when you called the store the next day to place your order, that you could not, without standing physically present in the store.* Even though you had been in the showroom the day before - you had left the "local trading area of that retailer" You must return to the store to place such an order.

After implementing such a policy, in St. Louis, Thomasville terminated approximately twenty retailers. This left approximately seven stores in St. Louis to market their products. These seven stores were owned by two individuals. These individuals rewrote Thomasville's suggested retail price list and agreed to sell at such prices (these prices, incidentally, were higher - not lower - than Thomasville's suggested retail prices).

Recently, these retailers agreed to a six-figure settlement with the Missouri Attorney General for price-fixing.

What exactly is the St. Louis consumer to do given such a situation? Physical presence restrictions require that they travel at their own expense to make a purchase rather than using other more convenient methods of placing the order. If travel is not possible for the consumer, or is not economically feasible, that consumer again has undesirable, limited choices -- to pay the price, to be inconvenienced by an expensive trip to North Carolina, or to go without.

Unreasonable evidentiary standards have denied discounters their constitutional rights and have actually provided full-price retailers and manufacturers with the ways and means of price fixing.

The results of these policies speak for themselves. The Justice Department, in 1975 provided Congress with empirical data that helped bring about the repeal of the "fair trade laws" (individual state price-fixing).

The study found that:

> Consumers paid 10% to 27% higher prices in states that allowed price-fixing;
>
> More businesses failed in states that allowed price-fixing;
>
> And fewer new businesses entered the marketplace in states that allowed price-fixing than in those that excluded such policies;

I recently presented to the House Judiciary Committee thousands of names representing thousands of interested consumers, many of them your constituents, who were restricted from shopping with the retailer of their choice. Indeed, restrictions aimed at shutting down discounters have left the consumer with few desirable choices. Many were forced to buy from a full-price retailer. Some traveled to North Carolina to meet "physical presence" requirements. Others simply went without.

That's what we'd like to see changed. This legislation will protect the consumer's right and privilege to shop with whom they please. It will encourage a free and openly competitive market for all retailers, while not leaving manufacturer's feeling pressured to react on the price level to retailer's complaints.

Opponents of this bill argue that the manufacturers will lose control over their distribution; that they will simply have to put their product in the pipeline and say good-bye. Failure to control the method of sale, they claim, could somehow hurt the manufacturer.

This is simply not the case. Many already lost this control by bending to the complaint of full-price retailers seeking to determine distribution. In this bill, the manufacturer's right to make unilateral decisions regarding distribution is completely unaffected. Only those decisions that relate to attempts by full-price retailers to influence price competition are relevant to this legislation.

We are not predators. We are not interested in running anyone out of business. We are not interested in having easier access to the courts merely for the sake of frivolous litigation. Most of us are small businesses. We do not have the economic resources to take to court major retailers and manufacturers in vertical price-fixing cases. We are interested in a free and competitive marketplace and the same rights granted by our Constitution.

It is interesting, to note that in recent years many full-price retailers, rather than complaining to the manufacturer, have taken a more active role in competing with discounters. They have made efforts to cut the fat. They have implemented programs to increase their levels of service to consumers. Conversely, discounters have had to increase their level of service to compete with the full-price retailers. Such free and open competition leads to more innovative consumer-driven retailing which benefits all parties; manufacturers, retailers, discounters and consumers.

I encourage and appreciate your review of the materials we have submitted to this committee and urge you to act quickly.

Thank you very much, Mr. Chairman and Members of the Committee, for giving me this opportunity to address you on behalf of our industry. It is a pleasure to be able to speak on behalf of a measure that will reinsure the marketplace freedoms so necessary to the success of this nation's economy.

TFI To Close 2 Company Plants For 5 Days Next Week, Idling 850 Workers

By Scott Wharton
Staff Writer

THOMASVILLE - Some 850 Thomasville Furniture Industries workers won't be reporting to work next week due to a five-day shutdown of two company plants.

Charles O'Brien, TFI's executive vice president for manufacturing, said sluggish orders in January had necessitated the temporary plant closings.

Plant A on Lexington Avenue, where bedroom and dining room furniture is produced, and Plant B on Fisher Ferry Street, where bedroom furniture is manufactured, close Monday, O'Brien said. Plants will re-open Feb. 27.

"We're taking the plants down to adjust our inventory," O'Brien said. "Our orders are not as strong as we'd like them to be."

O'Brien said the 850 manufacturing workers affected by the shutdowns would receive unemployment benefits for the missed work week.

The plant shutdowns mark the second time in two months that TFI workers in Thomasville have had unplanned vacations. Instead of the usual one-week Christmas break, workers stayed home for an additional week during the holiday period because of a "soft" December sales period, O'Brien said.

The employees were not paid for the entire week off, he said. The extended Christmas layoff made workers of Plants A and B eligible for immediate unemployment assistance during next week's shutdown.

Despite the two layoff periods, O'Brien said there is no reason for alarm.

"This is absolutely not a panicky situation," he said. "This is just the way this industry is. In this industry, everything depends on how much people buy and when they buy it."

Though customers haven't been buying in impressive amounts recently, O'Brien said he foresees that trend changing. While January was a sluggish sale month for TFI, O'Brien said order receipts for February "are looking better."

So far this year, TFI's sales are above those of the same period last year, he said. O'Brien predicted that 1989 would be "a slight growth year" for TFI.

But O'Brien explained that despite the sales level increase, next week's layoffs were still necessary. "With acquisitions, expansions and the hiring of additional employees, TFI is about a third larger than this time last year." The sales level increase has not compensated for the company's larger payroll and other obligations.

TFI, the nation's eighth largest furniture company, is Thomasville's largest employer with a work force here of about 4,000.

An official for a major downtown retailer said she doesn't like to see TFI's plants shut down.

"Any time there is a shutdown, I really feel this has an effect on our sales," said Elizabeth Gordon, operations manager for Belk-Yates. During TFI's extended Christmas vacation, store sales "were a bit slower than normal," she said.

During TFI's annual summer break, store

(See TFI CLOSINGS On 8B)

TFI Closings

(FROM PAGE 1B)

sales also tend to dip," she added.
For the furniture industry as
whole, 1989 has gotten off to a "so-so
start compared to the beginning
1988, said Doug Brackett, executiv
vice president of the American Fu
niture Manufacturers Assn. in Hig
Point. "Certainly, business could sta
to be stronger. But 1989 won't be a ba
year overall."
Brackett said TFI's schedule
week-long plant shutdowns were th
first he was aware of in the area th
year. Like O'Brien, Brackett said th
closings were not alarming.
"There could be any number of i
ternal circumstances that have pr
cipitated (the shutdowns)," he sai
"These things do happen from time
time. Over the long haul, I think TFI
position as an industry leader wi
remain sound."
Brackett noted that TFI's primar
upscale customer base could be mo
attuned to prevailing economic co
cerns than those of furniture co
panies selling lower-price
merchandise.
"There's always an uneasy peri
with a change in (federal) admini
trations," Brackett said.
Furniture retailers and others a
fretting over the budget and tra
deficits, the increase in the intere
rate and the possibility of Congre
raising taxes this year, he said.
But "barring any unforeseen
catastrophic circumstances," Bracke
said 1989 should be a good year for t
furniture industry. "More people a
working than ever before and housi

Henredon to close plant

FEB 3 1989

Mitchell County's largest employer will shut down one of four plants it operates in Spruce Pine, affecting about 125 workers.

Henredon Furniture Industries, headquartered in Morganton, will begin closing its No. 4 plant April 10, a company news release said. The plant produces occasional furniture, including end tables and coffee tables. The plant is being closed because of "a lengthy capacity study within the case goods division of the company," the company said.

Henredon officials could not be reached for

healthy order writing from U.S.

By Carole Sloan

MILAN, Italy — Despite a marked drop in the American retail presence, the U.S. influence at the International Furniture Fair here this week is being paced by orders.

"We are very happy," said Jeff Baren, Nicolleti Italia national sales manager, after the start of the show last week. "It's really been good. The important Americans are here — they're the guys who spend the money."

For Sandro Tenon of Tenon, the U.S. presence is marked by "a return of the manufacturers on the high end who used to shop and buy." He said this has been a "very positive" fair. Despite the problems with the dollar's value, "The showrooms have been only a little affected. And now that the dollar is coming back, we see some recovery in the department store business."

While there have been no major design directions, many of the Americans shopping and buying cited individual "finds." The most universal reaction has come from the ever-widening use of prints as an upholstery fabric, with many of the new covers in '60s looks, reminiscent of psychedelic motifs and colorings.

Whether these will translate effectively on a commercial basis to the American market is a question raised by a number of retailers.

For Judy George, head of Boston-based Domain, the fair has taken an important fashion turn for her purposes. "It's no longer just slick contemporary — there's a more transitional feel and one I can incorporate into my product mix."

Leather remains one of the more important cover stories, although not at the same frenzied pitch of recent years. In case goods, new combinations of wall systems are being shown with "bumper" effect tables as important adjuncts to the total systems for added function.

In both case goods and as frames for upholstered, dark wood finishes are emerging as fashionable. Mahogany is particularly important in this new direction.

In wood pieces, painted and washed finishes are abundant; the use of this technique is fresh looking when combined with the dark woods.

Lacquer, mostly in black, still is important but in the better price points, not in promotional goods.

In lighting, overscaled pots and tall table torchieres stand out as the important style directions at Euroluce, the lighting show that coincides with the fair. Metallic effects, especially in copper, silver and gold, are standouts in material directions.

Summing up the contemporary outlook for the lighting business, Michael Ber of Forluce, the New Orleans, La.-based distributor for Cierre Lampadari, said, "We are selling the better contemporary lighting looks in the United States, especially on the East and West Coasts."

Mo. retailers to reimburse consumers for false prices

ST. LOUIS — Three furniture retailers here have reached an agreement with the Missouri attorney general's office to reimburse $352,000 to area consumers for overpayments made from May 1986 to May 1987 on Thomasville furniture.

In a settlement negotiated in the St. Louis County Circuit Court last month, Carafiol Furniture Co., DeBasio Furniture and Phillips Furniture Co. also agreed to pay an additional $63,000 to the state.

Attorney General William L. Webster found that these retailers used a fictitious suggested retail price list when advertising sale merchandise from Thomasville. The furniture prices on the list were 8% higher than the manufacturer's bona fide suggested retail price list, the court said.

"By basing their sale prices on this fictitious price list, consumers were not getting the bargain they believed," said Webster. "We believe consumers were deceived, spending hundreds of thousands of dollars more than they should have."

About 2,500 consumers — who together purchased approximately $4.4 million of Thomasville furniture — will receive an average of $150 each under the terms of the settlement, which also prohibits the retailers from misrepresenting the manufacturer's suggested retail price list to

see page 37

Mo. retailers to reimburse consumers for false prices

from page 4

consumers. Carafiol operates two stores here and one in Fairview Heights, Ill. The company will pay an estimated $192,000 in restitution and $30,000 to a state Merchandising Practices Revolving Fund.

DeBasio operates two stores here, and the court found that one location used the fictitious price list. The retailer will pay an estimated $80,000 in restitution and $20,000 to the state merchandising fund.

Phillips, operator of three stores in this market, will pay an estimated $100,000 in restitution over a two-year period and will pay $13,000 to the state merchandising fund.

Dramatic shifts in pricing and mix designed to beat the 800 numbers

The more sophisticated 800-number and mail-order discounters become, the sharper the carriage trade merchants get in devising competitive strategies. In this issue, Design Today revisits the discount question and lets retailers speak about the ways they are dealing with what has long been a thorn in the side of high-end retailing. A separate story on page 24 looks at enterprising programs launched by Oxford Galleries in Birmingham, Alabama and Fowler's Furniture Plantation in Chattanooga, Tennessee.

By Kim D. Shaver

Talk to some of the country's savviest high-end merchants and you'll find not one is passively surrendering market share to the aggressive 800-number discounters populating the high-end scene.

Far from it.

Instead, merchants everywhere are rolling up their sleeves, determined to outwit discounters with new marketing strategies. As Ben Willis Jr. puts it, the challenge is an essential one: "It all boils down to the game of marketing. This is where your skills as a merchant come in."

Willis, president of the three-unit Willis Wayside Furniture in Virginia Beach and Williamsburg, Virginia, is one of many retailers pursuing tactics to beat the discounters. These retailers are altering their merchandise mix, specializing in particular products, private labeling goods, de-emphasizing case goods and offering lower prices than previously.

Many also are coding merchandise on the floor to disguise the manufacturer's names and item number, and they're turning to sources whose lines are not heavily discounted.

High-end merchants also are getting aggressive about service, enhancing their professionalism with sales training and related programs.

In advertising, many conventional high-end stores also are moving away from ads that mention price and tout manufacturers' name brands. Instead, they are selling their own name, reputation, image, service and look.

Some merchants, such as Fowler's Furniture Plantation in Chattanooga, Tennessee, and Oxford Galleries in Birmingham, Alabama, are choosing to beat discounters at their own game. Both retailers are getting plus business and improving sales and sometimes margins by setting up operations and policies that match discounters' prices.

Savvy stores know consumers would not be straying from neighborhood stores if those stores answered all their needs. "Any time a consumer study is done, consumers put furniture shopping way down on their list," observes Dick Lewis, president of Adele Hunt in Dallas.

"Since furniture shopping is so difficult, it seems easy to shop from a catalog," he points out. "The discount mail-order houses have been very [illegible] as if they're [illegible] service than a local dealer."

Adele Hunt's determination to provide a pleasant shopping experience has made customer service a number one priority, says Lewis. "We're extending more effort from the sales staff to the office to delivery and warehousing." Concludes Lewis, "If customers have a bad experience with a local retailer, it's [illegible] for going to an 800-number dealer."

While high-end merchants view the challenge from discounters as a serious threat to their profits and long-term growth, most believe they're positioned to out-maneuver the discounters.

Many high-end dealers believe the discounters have one and only one competitive edge: price. Most discounters take about 40 percent off manufacturers' suggested retail price.

Even though some discount retailers are providing more services than they once did and are investing in displays and gallery programs, conventional high-end merchants insist low price is the discounters' only strength.

And they note that even that edge is being blunted as full-service merchants are more inclined to sacrifice margins and retail goods at 20 percent or 25 percent off. Some stores are doing this on a regular basis. Others are turning to frequent sales of name-brand products as an opportunity to tout attractive prices.

Says Bill Brittain, president of three-unit Brittain's Fine Furniture in Houston, "Houston is so (price) competitive that there's no need to go beyond the city to get a deal. We are currently running a 40-percent-off on Hickory Chair...and have recently completed a 40-percent-off Drexel Heritage sale. There's no fat in the fire here."

Conventional merchants believe many of the tools they use to compete with retailers of all types are helpful in battling the discounters. Service and a unique product mix are the staple ammunition of the high-end store, no matter the source of competition.

Says Bernie Moray, president of Southfield, Michigan-based Gorman's, which operates three Drexel Heritage stores and a high-fashion contemporary store, "We've tried to place ourselves in a position where our design capability is so outstanding that if they buy anywhere else, they're just buying furniture."

Moray adds, "People would be hard-pressed to find the product in our contemporary store anywhere else. We just try to overwhelm the customer with service, so that we're not selling apples to apples, but peaches to apples."

Gorman's has also invested heavily in its community image. "We've tried to carve a niche in the marketplace, and we've made it fashionable to buy at Gorman's," Moray says.

Blum's, which operates seven high-end, designer-oriented specialty shops in southern Florida, also sells image. The store seeks to present an inimitable look that can't be achieved by mail order or a long-distance purchase. "Instead of advertising brand names, we advertise slick, elegant, beautiful settings," says Tim Blum, president. "Consumers aren't coming just to buy furniture, but because they love our look."

Retailers view customer service as another great stronghold, with an emphasis on detail, professionalism and a personal touch. Moreover, retailers are making a point of heavily promoting service.

In fact, merchants see the discounters' lack of service as their most vulnerable point and believe that if neighborhood stores excel in service, it can be their most significant advantage.

"We illustrate to the consumer a 'before' and 'after' service scenario," says Brittain in Houston. "We take the consumer back into the warehouse and show them a box of furniture and tell them, 'This is what you'd get if you order from an 800 number.' Then we take them out on the floor and show them the product set up on the floor, finished and assembled."

Concludes Brittain, "We sell ourselves as offering a safer investment to the consumer."

Asserting that "the discounter problem is continuing to escalate and is eating our margins every day," John [illegible], president of Louisville, Kentucky-based [illegible]'s, has overhauled his

Ben Willis Jr. of Willis Wayside Furniture, Virginia Beach, Virginia: "It all boils down to the game of marketing."

Dick Lewis of Adele Hunt, Dallas: "If customers have a bad experience, ...it's hard to blame them for going to an 800-number dealer."

Bill Brittain of Brittain's Fine Furniture, Houston: "We sell ourselves as offering a great investment to the consumer."

Bernie Morey of Gorman's, Southfield, Michigan: "We just try to overwhelm the customer with service."

customer services as a means of competing with 800-number merchants.

"We've just established three delivery times – morning, afternoon and evening. We've also established a one-week follow-up deadline for any customer service problem," Heleringer says. "We tell customers that their problems will be solved in a maximum of one week from the time they first call us. And we're stressing these services in our advertising."

The retailer has also turned its warehousing and delivery functions over to a company specialising in those areas.

Heleringer's, like several high-end merchants, is private-labeling some of its case goods and upholstery. But the retailer features specialized galleries devoted to Baker, DIA, Drexel Heritage, Hickory Chair and Pennsylvania House. And Heleringer believes gallery programs in many ways help a local merchant compete against discounters.

He cites these programs' exclusive merchandise, special delivery times and general support from the factory. "The distribution locally is wonderful with galleries," he says. But he hastens to add, "Distribution of name brands...with 800-number merchants is undermining the gallery structure."

One of the most important tactics retailers are adopting in their battle with discounters is de-emphasizing case goods. Bedroom and dining room are generally more heavily discounted than any other merchandise category in the industry, say merchants.

And when dealers are forced to sacrifice margins in case goods in order to be more price competitive, they try to increase their volume in higher-margin goods such as decorative accessories and upholstery. By merchandising in this way, merchants are attempting to – and succeeding in – offsetting their losses.

"Upholstery, accessories, occasional, lamps and tables are the things we build our merchandise programs around," says Willis, of Willis Wayside. His store has gone a step further and added product boutiques devoted to bed and bath shop, decorative accessories, gifts and tabletop.

By emphasizing unusual items than cannot easily be shopped for on a comparative basis, Willis Wayside is realizing both plus business and higher margins.

In a similar move away from case goods, Heleringer's is emphasizing upholstery and occasional furniture. The merchant private-labels much of its upholstery. "I think you're going to find that case goods will be emphasized less and less," Heleringer says. Referring to the difficulty of getting good margins on case goods because of the price competition from discounters, Heleringer adds, "This is one of the reasons for the softening of the case goods market. Retailers aren't making money in case goods."

Private-label goods is a basic strategy for retailers eager to beat the discounters. J.H. Harvey in White Plains, New York, has been private-labeling its furniture with the J.H. Harvey name for several years and offering a five-year warranty on all product.

The merchandise is produced by such manufacturers as Baker, Century, Dansen, Hickory Mfg and Kindel, but the producers' labels are removed or covered by a brass plaque touting the J.H. Harvey name.

Fabric swatches are also private-labeled with Harvey's name. According to Donna Myers, executive vice president, the private label program was launched with an ad campaign touting the J.H. Harvey name and what it stands for: "enduring quality, outstanding value and classic design." The result of its private-label program: "We've been able to keep our margins up on name-brand case goods," says Myers.

She notes the J.H. Harvey name has come to be a prestigious label for affluent consumers, who are willing to pay for it.

In fighting the battle with discounters, merchants believe they have a key ally on their side: major high-end manufacturers. In recent years, pursuing a strategy that parallels an aggressive development of gallery dealers, some manufacturers have taken steps to support the traditional high-end merchant.

Producers are limiting advertising of their brands to the retailer's trading area, requiring galleries or special displays of their products, and [illegible]

Retailers generally feel that manufacturers' efforts have helped them compete more profitably, but they feel the producers haven't gone far enough. Many feel the [illegible] of the full-service retailer [illegible] lies in the manufacturers' hands.

"Although this is a real problem, it is a manufacturer's problem," says Houston retailer Brittain. "It is the manufacturers who have allowed this kind of distribution and uneven playing field."

Brittain's stays in close touch with its suppliers on the discounter issue and has found open channels of communication effective. "We try to make the manufacturers aware of every job we lose and why," Brittain says. "We give them names and telephone numbers and even present a copy of the purchase agreement if the consumer brings it to us asking us to meet the price. Giving this kind of specific information to the manufacturers makes a difference."

Although merchants concede the battle with discounters is likely to rage for some time in the high-end arena, they are optimistic about the long-term outlook for the independent, full-service high-end retailer.

In addition to all the other factors on their side, carriage trade merchants see an inevitable retail cycle working upon them. Eventually, they suggest, discounters will try to become more service oriented and ultimately will lose at their game.

"Already you're seeing the discounters losing some of their price advantage because they [illegible]," observes Willis, of Willis Wayside. "And you're seeing discounters beginning to offer more services to compete with us. Eventually, their overhead will increase and someone else will come along and undercut them. That's the way it goes." ■

Fowler's Furniture, Oxford Galleries decide to play Carolina discount game and win

[illegible]

To compete head-on with North Carolina discounters, Fowler's Furniture Plantation in Chattanooga, Tennessee, discounts high-end lines by about 40 percent off the suggested retail price. This setting is from the store's Century gallery, one of several galleries on Fowler's floor.

If you can't beat 'em, join 'em.

That's the conclusion high-end merchants Richard Fowler and Lamar Chew came to after losing many sales to 800-number discount retailers.

Of the many high-end merchants aggressively fighting discounters, Fowler and Chew are noteworthy for making far-reaching changes in their businesses.

Fowler, president of Fowler's Furniture Plantation in Chattanooga, Tennessee, revised his current operation. And Chew, president of Oxford Galleries in Birmingham, Alabama, created a new business. Both actions were aimed at beating the discounters.

These retailers now match or come within 5 percent of the discounters' furniture prices, 40 percent off suggested retail prices. At the same time these retailers are offering full service, including follow-up calls and free delivery. While they have discount prices, they limit selling and advertising to the local trading area.

Chew took a former Oxford clearance center across town from his main unit and converted it to a store called Direct Wholesale Furniture Outlet. It's operated as a subsidiary of Oxford Galleries. Nevertheless, Oxford makes customers aware that it operates the outlet, and in ads for Direct Furniture refers to the store as "an Oxford Galleries company."

In deciding on his merchandise mix and sources, Chew identified the major brands that he carried that were most often discounted and responsible for lost sales. Oxford Galleries' brands most often discounted, according to Chew, include Council Craftsmen, Davis Cabinet, Henkel Harris, [illegible] and Southwood Reproductions.

Chew requires a down payment and balance upon delivery, but recently Oxford launched its own credit card that customers can use for discount as well as regular purchases. Chew sees the credit card as an important tool, since 800-number retailers typically accept only cash from consumers.

Fowler, unlike Chew, did not set up a separate store. But he did alter the nature of his entire operation in order to compete with the discounters by establishing a new pricing policy called "Carolina prices."

Believing consumers prefer the security of buying from a full-service, local retailer if the price is competitive, Fowler set up a two-tier price structure for all merchandise carried by his high-end store.

We've Knocked The Stuffing Out Of Overpriced Furniture

Oxford Galleries created a separate outlet to beat 800-number retailers. Claiming "we've knocked the stuffing out of overpriced furniture," an extensive ad campaign introduced the store to Birmingham consumers.

The largest of four stores in Fowler's sprawling 120,000-square-foot Furniture Plantation, the high-end store covers 60,000 square feet and features galleries devoted to Baker, Century, Classic Leather, DIA, Drexel Heritage, Hickory Chair, Knob Creek, La Barge, Venture and White of Mebane. The high-end store also carries a large selection of Oriental rugs.

Fowler's regular price is based on a full markup. The Carolina price represents approximately 40 percent off suggested retail. To qualify for these lower prices, consumers must place a special order and pay one-third down in cash and the balance when the merchandise is delivered.

Fowler goes a step further to keep business at home. Rather than lose a customer, he will reduce even his Carolina pricing and match what might be a lower price from a discounter if a Fowler customer can document that price.

"Say a consumer brings us a price from a discounter of $100 less. If we can verify that price, we will match it with the same terms and services the discounter is offering," Fowler says.

Both Fowler and Chew have succeeded beyond expectations with their strategies to beat the discounters. "We really had no earthly idea how much business we were losing until we went head-to-head with the discounters," says Fowler. "We were losing business every day, even though we didn't realize it."

Fowler says that before devising the Carolina pricing policy, the retailer evaluated the prices 800-number retailers charged on some major brand items. The study convinced Fowler he could create a competitive program that would "bring business back home."

Fowler says he took out of his prices the cost of financing, warehousing, handling and display. The result: "meeting the average price of what each of the discounters was offering."

Since instituting Carolina pricing a few years ago, Fowler says, both volume and margins have increased. Margins have increased, he says, because there are fewer clearance sales and because the increase in special orders has cut inventory and cost of sales. Furthermore, "word of mouth has become so powerful," he says, the store also could cut advertising.

Oxford Galleries, on the other hand, has found the average margin from the wholesale outlet and the regular high-end store has been reduced slightly, but that drop has been compensated for by increases in sales. "We make up for lower margins in higher volume, and inventory costs have been reduced, so we can live with the lower margins," says Chew.

Chew found the warehouse operation built sales for the retailer and even boosted sales at the 60,000-square-foot Oxford Galleries. "We recaptured a group of customers — the hard-core shoppers who look for price as a priority," says Chew. "And we found that once we get them as customers at the wholesale outlet, they often become customers at the other store as well." B.D.S.

Written Statement

NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

In Support of S.865,

The Consumer Protection Against Price Fixing of 1989

TO THE SENATE JUDICIARY COMMITTEE ANTITRUST COMMITTEE

Senate Dirksen Office Building
Washington, D.C. 20510

June 1, 1989 - 10:00 A.M.

The National Association of Catalog Showroom Merchandisers (NACSM) strongly supports S.865.

NACSM testified before the Committee in favor of repeal of the fair trade laws in 1975. NACSM has been urging the Congress to reject retail price fixing for most of this decade (since the Antitrust Division of the Department of Justice began to support such concepts early in the last Administration).

In March of this year NACSM joined other discount retailers in submitting testimony to the House Judiciary Committee in support of the companion bill, H.R. 1236. NACSM is aware of the testimony of other discount retailers before the Committee this day, and fully supports it.

NACSM has co-sponsored the 30 page economic study prepared by Professor William Comanor of the University of California, Santa Barbara, which is being submitted this date; NACSM strongly supports this basic intellectual framework for the proposition that retail price fixing is a recognized economic evil. Those who would change the rules of the game have not met their heavy burden of proof; to the contrary all available evidence suggests that retail price fixing is injurious to the consumer. NACSM limits its specific comments herein to several current issues which we believe of critical importance to the Senate in considering S.865.

First, as Professor Comanor notes in his economic analysis, virtually everyone, both opponents and proponents of retail price fixing ("RPM"), concede that the practice increases prices to the consumer.

Second, proponents of RPM have offered a number of rationalizations for permitting suppliers to set the retailers' prices, including such arguments as "a free rider" problem, "product certification" advantages, etc. Most knowledgeable observers in the marketplace have always known this was a "smoke-screen."

However, current prevalent practices in the marketplace provide indisputable evidence that this is the case. For example, three (3) Japanese camera manufacturers in the past year have announced minimum advertised price programs. In all of these cases, the product has been offered to discount retailers, including catalog showrooms, without any conditions as to service requirements or other amenities other than the requirement that the cameras be advertised for not less than a minimum price. A copy of these programs with a minimum advertised prices is included as an exhibit to this statement. These minimum advertised prices use the "leverage" of cooperative advertising monies to coerce compliance. This practice has alarmed catalog showrooms and other discount retailers as it has accelerated as an acceptable method of doing business in the marketplace. But regardless of the means employed, the clear lesson to be learned is attempts to fix retail price fixing have nothing whatever to do with any free rider or certification issue. Parenthetically it should be noted that catalog showrooms provide the same or a better level of service and amenities than many of the retailers selling at the full proscribed prices.

Third, NACSM is continually amazed that most of the companies attempting such price stabilization schemes are subsidiaries of foreign suppliers. For example, in addition to the three (3) Japanese camera companies who currently have minimum retail price programs, a fourth Japanese camera company, Minolta, was cited by the Attorneys General of a half dozen states two summers ago for attempting to limit sales of its Maxuum camera to a minimum resale price.

For example, the Attorneys General of New York and Maryland settled a complaint against a Japanese audio manufacturer, Panasonic, for allegedly attempting to set minimum resale prices for its product for several months in January of 1989. It should be noted that at approximately this same time that Panasonic settled this case (agreeing to refund millions of dollars to consumers) it simultaneously terminated the sale of products of its Technics division to the industry. It is reported to us that after settling this case Panasonic has just announced yet a new minimum advertised price program. A copy of this pricing showing the manufacturers suggested list price and the lower minimal accepted advertised price is herewith provided to the Committee.

For example, it is reported to us that there is another Attorneys General investigation of video manufacturers use of minimum retail prices now underway. Reports to NACSM indicate that these companies are again foreign suppliers. One of these companies under inquiry is the supplier of RCA/GE televisions; this division was sold by the renowned American company to a French concern last year, and it appears that they are now aggressively pushing minimum retail prices upon the catalog showroom industry.

Fourth, the National Association of Attorneys General has almost unanimously opposed vertical price restraints and found it necessary to issue their own Vertical Restraint Guidelines to counter the "notorious" U. S. Justice Department Antitrust Division Vertical Restraint Guidelines that the Congress of the United States by Joint Resolution condemned as clearly erroneous. As noted above, the Attorneys General have now become aggressive in investigating retail price fixing in the various states, apparently because of a vacuum created by the non-action at the federal enforcement agencies.

NACSM believes that consumers, discount retailers, and all those that believe in unfettered, open, competition owe a debt of gratitude to these Attorneys General. Certainly the states have a right to prevent such acts within their borders.

Indeed as the most recent issue of HFD ("Home Furnishing Daily") shows the North Carolina legislature seems ready to go a step further and pass a bill which not only restricts certain vertical restraints but (as unreported in the story) would specifically prohibit retail price fixing agreements which result in the termination of price cutting retailers.

However, most of these problems are created by manufacturers selling nationally-recognized brand products throughout the fifty states.

These products are sold by catalog showrooms and other retailers in their markets which span a geographic scope of one city or town, to a vast majority of states. It is a problem that can most effectively be resolved on the national level; it has only been a default on the federal level that has required the current pace by the States Attorneys General.

Last, we respectfully suggest that the Senate can send a clear message to the marketplace that retailers have no business complaining to their suppliers about low prices of their retail competitors, asking that low priced retailers be denied access to product. We respectfully suggest that this can most be efficiently be accomplished by passing the Consumer Protection Against Price Fixing Act of 1989. We believe its passage will be well noted in the marketplace, and will result in more competition, not more lawsuits.

We do not claim that all of the current practices violate the law as now interpreted. We do claim that a new attitude, permissive of retail price fixing, has exacerbated the situation. We do believe that a clear demarcation of those agreements that are unlawful will well serve the marketplace. We urge passage of S.865, and ask the support of every member of the Senate Judiciary Committee.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS
Richard B. Kelly, General Counsel
Jean Coticchio, President

Consumer Products Group
OLYMPUS
Olympus Corporation Crossways Park Woodbury New York 11797 (516) 364-3000

Dear Olympus Dealer:

Effective immediately, Olympus will modify its Dealer Advertising Program by introducing a minimum advertised price policy for the Infinity SuperZoom 300 camera. Until further notice, the minimum advertised price at which an ad for the Infinity SuperZoom 300 will be eligible for reimbursement through our Dealer Advertising program is:

$359.95

It is our belief that this action is necessary and desirable to protect the quality image of the Infinity SuperZoom 300 and the Olympus brand in the market place.

Other than existing guidelines for our Dealer Advertising Program and eligibility for reimbursement under this minimum advertised price policy, Olympus will not place any limitations on how you advertise the Infinity SuperZoom 300. You will continue to be free to advertise the Infinity SuperZoom 300 as often as you like at any price you feel is appropriate at your own expense.

Let me be clear in stating that this policy is not designed to influence your actual selling price. The price at which you sell the Infinity SuperZoom 300 is entirely your decision.

We will review this policy from time to time and make adjustments in the minimum advertised price as may be necessary based on dealer net cost, market conditions and competitive activities.

We are confident that this policy will contribute to the success of the Infinity SuperZoom 300 and make Olympus a more valuable supplier to your business.

Sincerely,

David Willard

David Willard
Senior Vice President - Marketing

February 28, 1988

Consumer Products Group
OLYMPUS
Olympus Corporation Crossways Park Woodbury New York 11797-2087 (516) 364-3000

Dear Olympus Dealer:

In a letter to you dated February 28, 1988, we announced our minimum advertised price policy for the Infinity SuperZoom 300 camera. At that time, we stated that "We will review this policy from time to time and make adjustments in the minimum advertised price as may be necessary based on dealer net cost, market conditions and competitive activities."

This is to advise you that, effective immediately and until further notice, the minimum advertised price at which an ad for the Infinity SuperZoom 300 will be eligible for reimbursement through our Dealer Advertising program is:

$339.00

We are making this adjustment to reflect increased availability of the SuperZoom in 1989 and the introduction of new competitive products in the market.

Other than standard guidelines for our Dealer Advertising program and eligibility for reimbursement under this minimum advertised price policy, Olympus will not place any limitations on how you advertise the Infinity SuperZoom 300. You will continue to be free to advertise the Infinty SuperZoom 300 as often as you like at any price you feel is appropriate at your own expense.

Let us once again be clear in stating that this policy is not designed to influence your actual selling price. The price at which you sell the Infinity SuperZoom 300 is entirely your decision.

Thank you for your contribution to the success of the SuperZoom and your understanding of our marketing policy.

Sincerely,

David Willard

David Willard
Senior Vice President - Marketing

February 15, 1989

September 30, 1988

Dear Nikon Consumer Products Dealer:

We have written to you before about our ongoing efforts to build upon the reputation of Nikon photographic products making them more attractive to consumers and more competitive with products made by other manufacturers. We are writing now to inform you of an aspect of this effort that will effect the Nikon Cooperative Advertising Program beginning November 1, 1988.

We believe the image and market positioning of our products, especially new products, is strongly influenced by the prices consumers see advertised for them. This has a direct effect on the competitive success of these products. You are, of course, entitled to sell the products you purchase from us at whatever price you determine, and to advertise that price. We have decided, however, that we will no longer subsidize advertising that we believe undercuts the market position of products for which market positioning is a critical element of success.

While we believe this applies to all Nikon products, it is difficult to reverse the effect that advertising has had on products that have been on the market for some time. As a result, our initial direction will be toward new products.

Accordingly, we have revised our Cooperative Advertising Program and, as of November 1, 1988, the enclosed Nikon Cooperative Advertising Program is effective. Please review the total program requirements and, in particular, note the following changes that have been made:

1. Eligible Media - Print: All publications, including general-interest newspapers, magazines and other print media, which are either listed in Standard Rates and Data (SRDS) or can provide a printed rate card and circulation statement verifiable through independent audit, are now considered eligible media for co-op reimbursement.

2. Any advertisement appearing on or after November 1, 1988, for the recently announced Nikon Zoom-Touch 500 camera will be eligible for co-op reimbursement if:

    A. (i) it is for the camera only and specifies a price no lower than the Minimum Advertised Price for that camera (See attached list); or

    (ii) it is for the camera only and mentions no price ("call for price" is acceptable).

    B. the price or value of the camera is not obscured by combining its price or value with that of other products offered in the advertisement.

Thus, an advertisement for a Nikon Zoom-Touch 500 at a price below the Minimum Advertised Price does not qualify for reimbursement, nor does an advertisement for a Zoom-Touch 500 camera with any accessory. Likewise, an advertisement for a Nikon Zoom-Touch 500 which also contains an offer for another product at a special price based upon the purchase of a camera does not qualify for reimbursement.

3. Any advertisement which is ineligible for reimbursement under requirement #2, above, will also disqualify for reimbursement all advertisements for any Nikon product appearing thirty (30) days before and thirty (30) days after the ineligible advertisement appears.

    Thus, if you run an advertisement for a Zoom-Touch 500 camera that is not eligible for reimbursement because it mentions a price below the Minimum Advertised Price; or contains an accessory; or contains an offer for another product at a special price which is contingent upon the purchase of a camera, you must pay for that advertisement yourself, and also for any and all advertisements on any Nikon product you ran during the preceding 30 days, and all advertisements for any Nikon product you run during the following 30 days. Any co-op credit (reimbursement) that might have been issued to you during the preceding 30 day period will be charged back to your account.

To emphasize once again, you are free to determine for yourself at what price you wish to sell a product for, and to advertise that product at your own expense. The only effect of these changes is that Nikon will not pay for advertising that we believe has a detrimental effect on the reputation and market position of these Nikon products. We feel certain that you will understand that building the reputation and competitiveness of Nikon products will ultimately benefit all of our dealers as well as Nikon.

Your Regional Sales Manager will be happy to answer any questions you may have.

Sincerely yours,

Cliff Montgomery

Clifford Montgomery
National Accounts Sales Manager

CM/rl/am
Enclosure

Canon
CANON U.S.A., INC.
ONE CANON PLAZA
LAKE SUCCESS, N.Y. 11042-1113
TELEPHONE (516) 488-6700

Canon EOS
Photography. Pure and simple.

March 26, 1989

CANON EOS 630 MINIMUM ADVERTISED PRICE

Dear Canon Retailer:

We would like to inform you of a new and important co-op advertising regulation that pertains to advertising for the new Canon EOS 630 SLR camera. It is designed to help you maximize the impact of your Canon Co-Op advertising.

The following regulation will become effective for claims for co-op advertising credit for advertising published commencing March 26, 1989:

Advertisements for the sale of the Canon EOS 630 which are placed for publication after March 26, 1989 will not be eligible for co-op advertising credit unless the advertisement includes a price not less than the minimum advertised price or does not include any price in the advertisement.

The following schedule shows Canon's suggested list price and minimum advertised price for the Canon EOS 630. Please note, however, that these prices are subject to change. Of course, you will be notified if and when any changes occur.

MODEL	CODE NUMBER	MINIMUM ADV. PRICE FOR CO-OP CREDIT	SUGGESTED LIST PRICE
EOS 630 body only	C12-8082-221	$479.95	$710.00
EOS 630 w/EF 50mm f1.8	C12-8082-881	$549.95	$825.00

This co-op advertising regulation is not intended to influence you in selling the Canon EOS 630 at any particular price. The sales price is to be determined by you only and no employee or representative of Canon has authority to tell you what resale prices to follow or influence you in any way in making pricing decisions.
Note: This regulation applies to Canon EOS 630 model only.

In summary, you may advertise and sell the Canon EOS 630 at any price you wish. However, if you wish to have Canon issue Co-op advertising credit for any advertisement, you must include a price no less than the minimum advertised price or do not include any price in the advertisement.

Canon's co-op program is an ideal way to increase store traffic and generate more sales. Please take advantage of it.

As always, we thank you for your continued strong support.

Sincerely,

Howard Ozawa

Howard Ozawa

Reported May 1989 PANASONIC PRIC

RADIO/CASSETTE

MINIMUM SELL

MODEL	SUGGESTED RETAIL
RX-FS400	54.95 - 57.95
RX-FS450	79.95 - 84.95
RX-FT500	84.95 - 89.95
RX-FT550	109.95 - 114.95
RX-CS700	74.95 - 79.95
RX-CT800	99.95 - 104.95
RX-DS30	299.95 - 329.95
RX-CW43	149.95 - 159.95
SL-NP11	329.95 - 349.95

PRICES ARE SUBJECT TO CHANGE

Reported May 1989 PANASONIC PRICES

RADIO

MINIMUM SELL

MODEL #	SUGGESTED RETAIL
RF-542	19.95 - 21.95
RF-559	29.95 - 32.95
RF-1050	27.95 - 29.95
RF-B40	219.95 - 229.95
RF-423	21.95 - 23.95
RF-H2	29.95 - 32.95
RF-H6	39.95 - 42.95
RE-6266	25.95 - 27.95
RE-6280	36.95 - 39.95
RC-6064	19.95 - 22.95
RC-6067	24.95 - 27.95
RC-6090	27.95 - 29.95
RC-6095	32.95 - 34.95
RC-6180	39.95 - 42.95
RC-6190	37.95 - 39.95
RC-70	42.95 - 44.95
RC-X150	59.95 - 64.95
RC-X210	49.95 - 52.95
RC-X250	79.95 - 84.95
RC-T340	69.95 - 74.95

PRICES ARE SUBJECT TO CHANGE

Furniture

14

5/29/89 HFD

High-end makers nix N.C. bill

Prepare to change distribution in event of passage

By Robert Marks

HIGH POINT, N.C. — Several major manufacturers of upper-end furniture with high brand-name recognition are braced for significant changes in their distribution policies, should a bill now before the North Carolina General Assembly become law — as was expected last week.

The measure, which prohibits manufacturers from restricting retail sales through toll-free telephone numbers and mail orders, is supported by discount furniture retailers in North Carolina, who do most of their business with 1-800 telephone numbers and mail orders. Manufacturers claim that such discount sales are unfair to their established dealers in other parts of the country.

At least six vendors, including Kindel Furniture and Baker Furniture, have stated they will no longer service their retail accounts in North Carolina if the controversial measure is implemented.

"We feel we have to protect our distribution and our loyal dealers," said Robert Fernbacher, president of Baker Furniture, which has seven retail accounts in North Carolina. "We view this bill as a very bad measure that will have a devastating impact on the industry. This is a very poor bill for dealing with the relationship between the manufacturer and the retailer."

Other manufacturers who have said they will discontinue sales to retailers in North Carolina or will consider other options for doing business in the state are Thomasville Furniture Industries, Pennsylvania House, and four Masco companies: Henredon Furniture, Drexel Heritage, Hickorycraft and La Barge Mirror.

However, another Masco company, Lexington Furniture Industries, has said it will make no change in its distribution policies.

"Each Masco company is reacting individually, according to its own marketing program," said Ron Jones, president of Masco Furniture Group. "This is a bigger issue for the higher-end lines rather than for a company like Lexington Furniture, which has open distribution. Henredon and Drexel Heritage, however, have spent decades and millions of dollars to develop their image in the marketplace. They have a right to protect that image."

It is his judgment, Jones said, that the North Carolina bill would have a "negative impact" on the industry. "Manufacturers have the right to decide which retailers to do business with and to put their product in the right image. I am not unsympathetic to the retailers, but this sems to be a case of a handful of dealers who have a list of perceived greivances against one or two manufacturers. This dispute has been in the courts, and court precedents have been established. To attempt to resolve this dispute with this piece of legislation seems to be overkill."

At the center of the legislative battle is Thomasville Furniture Industries and its gallery program,

"I do not think the legislature ought to be intervening in the relationship between the manufacturer and the retailer."
— Fred Starr,
Thomasville Furniture

"We view this bill as a very bad measure that will have a devastating impact on the industry."
— Robert Fernbacher,
Baker Furniture

which imposes limitations on dealers carrying the product line. "We have been through the experience of having our line carried by a lot of retailers who sold it anyway they wanted to. We saw no sales gains in that," Fred Starr, president of Thomasville Furniture, said. "We went to the gallery program to overcome this and to re-establish our line and our name in the marketplace. I do not think the legislature ought to be intervening in the relationship between the manufacturer and the retailer."

Douglas Brackett, executive vice president of the American Furniture Manufacturers Assn., which has lobbied against the bill, said the measure will make North Carolina the only state with such a law and the furniture industry the only industry to be singled out by such a law. "If this bill passes, a precedent will be set in North Carolina. A Pandora's box will have been opened as far as the relationship between manufac-

(See HIGH-END, page 16)

5/29/89

High-end makers to change distribution if N.C. bill passe

(Continued from page 14)

turer and retailer is concerned."

The National Home Furnishings Assn., the national retail furniture group, spoke against the bill during hearings early in the session. But the main lobbying effort on behalf of the measure has been carried out by the North Carolina Retail Merchants Assn., headed by Bill Rustin, a former furniture retailer.

Because of consolidations within the industry and development of gallery programs with restrictions set by manufacturers, retailers are losing not only their ability to sell by telephone or mail, but the identity of their stores.

"We see the restrictions that manufacturers are imposing w
their galleries as a major infusi
of manufacturers dictating to
tailers how retrailers should d
tate to consumers," Rustin sai
"The manufcturer to retailer li
is controlled by the manufactu
but the retailer link to the c
sumer should be controlled by
retailer. Manufacturers sho
not be allowed to tell retailers th
should not advertise their sto
outside their local market are
That is what manufacturers
trying to do."

Rustin predicted that
measure, which passed the No
Carolina State Senate by a vote
35-9, would be approved by
North Carolina State House
Representatives by an eq
margin.

Senator METZENBAUM. Mr. Creamer.

STATEMENT OF ROBERT B. CREAMER, EXECUTIVE DIRECTOR, ILLINOIS PUBLIC ACTION COUNCIL, CHICAGO, IL

Mr. CREAMER. Yes, sir, Senator, good morning. I am Robert Creamer, the executive director of the Illinois Public Action Council. Today, I wish to testify in favor of S. 865, the Consumer Protection Against Price-Fixing Act, introduced by yourself and cosponsored by Senator Simon of our State.

The Illinois Public Action Council is the State's largest public interest organization, with 168,000 member families in Illinois. Over the last 15 years, we have advocated for the consumer on a wide range of issues, from energy and insurance rates to health care costs and consumer rights at both the State and Federal level. We are also the State affiliate of Citizen Action, the nationwide public interest organization of 2 million members that works on the same broad array of consumer concerns.

This morning, I wish to strongly endorse the proposed legislation and protections it will provide to middle and lower-income families by guaranteeing a genuinely free market for consumer goods.

A free market in the true sense is one that is free for the consumer, not one that is free for the producer. Such a market can only be truly competitive when no single market player has the ability to fix the price of a product.

Rather, in a free market it is the law of supply and demand that sets the price, and intimidation of the retailer by a producer in order to secure a single high price provides no long-range benefit to the consumer.

It should be noted as well that many of the same opponents of this legislation frequently invoke the benefits of the free market and competition when they wish to avoid government oversight of their activities. Yet, they seem to quickly forget those benefits when it is the intention of government to encourage the market by preventing manufacturers from interfering with the competitive market at the retail level.

Recent history has clearly shown that consumers do indeed benefit from active price competition for consumer goods. This is abundantly evidenced by the explosion of discount outlets for consumer electronics, major appliances, apparel, and other items since the Congress overturned the State price restrictions of the fair trade laws in 1975.

This trend has meant dollars, real dollars in the pockets of average consumers. The Antitrust Division of the U.S. Justice Department has found that consumer prices averaged 19 to 27 percent higher in the States with so-called fair trade laws that were allowed previous to 1975. It was estimating that such restrictions were costing American households $6.5 billion each year in 1975 dollars alone.

By contrast, a 1982 study by the Federal Trade Commission found that active antitrust pressure on just one manufacturer, Levi Strauss Company, saved consumers $72 million annually in the cost of Levi Strauss jeans items alone.

Last summer, a Public Citizen survey said that there was a 23-percent average savings on goods purchased at discount for summer items as compared with those at full-price retailers.

Now, such savings have been particularly important to middle and lower-income families struggling to make ends meet. The ability to shop around and buy at discount outlets means that the average American family saves an estimated $500 a year, amounting to as much as $23 billion nationwide.

Now, that $500 might not mean much to an executive who can drop $300 on a lunch or spend $100 on a bottle of wine. But to most Americans, $500 is real money, and to many it makes the difference as to whether they can buy that VCR or that color television set or that washing machine. It makes a real difference in their standard of living.

The benefits of this legislation to consumers are obvious. How could it possibly be argued that the Houston area consumers would be somehow better off if they could only buy Sharp calculators at a single high-priced outlet? Yet, such limited options will be the direct result of allowing the Supreme Court's rulings in the *Sharp* and *Monsanto* cases to stand as the antitrust law of the land.

It is also clear that the proposed legislation has been carefully drafted to ensure that the consumer concerns about service and quality, as well as legitimate contract rights of manufacturers, are maintained.

Now, the other side says that there is really not a problem, that discounters have flourished in the last number of years. But this is a battle about the movement in the law. If *Sharp* and *Monsanto* are allowed to stand, the inevitable consequence will be an increased fear on the part of retailers that if they discount products, they might be subject to retaliation from manufacturers.

Decreased incentive to discount will result, and upward pressure on prices will be the net consequence.

Now, let me say one final thing about this free-riding issue. We are very concerned that service be provided by retailers, but the issue as it has been posed by the manufacturers is nothing more than a red herring.

There is nothing in the law, current or future, if this law is passed, that will prevent manufacturers from insisting on contractual obligations of their retailers. They can insist that certain standards of service and quality and certain standards of product support are met under the current law and under the law that is proposed here.

This does not provide any reduction in that ability. The free-riding argument, in our view, is nothing more than a red herring.

On behalf of Illinois consumers, I would strongly urge committee approval of S. 865 and its speedy approval by the full Senate.

Thank you very much.

Senator METZENBAUM. Thank you, Mr. Creamer. I know that you are testifying on behalf of the Illinois group, but do you feel you reflect the views of consumer groups throughout the country on this issue?

Mr. CREAMER. We reflect the views both of national Citizen Action and of—there are quite a number of consumer organizations, as you know, Senator, who have signed on to this bill, from

Public Citizen to the Consumer Union to the Consumer Federation of America to State organizations of the sort that we represent all over the United States.

Senator **Metzenbaum**. Thank you very much.

[The statement of Mr. Creamer follows:]

Illinois Public Action Council

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44 Main
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(217) [illegible]

219 East State Street
Rockford, IL 61104
(815) [illegible]

311 16th Street
Rock Island, IL 61201
(309) 786-1775 or 76

100 N. Main
Edwardsville, IL 62025
(618) [illegible]

UNITED STATES SENATE -- COMMITTEE ON THE JUDICIARY
S. 865/THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT

Testimony of Robert B. Creamer, Executive Director
Illinois Public Action Council

June 1, 1989

Good Morning. I am Robert Creamer, Executive Director of the Illinois Public Action Council and today I wish to testify in favor of S. 865, the Consumer Protection Against Price-Fixing Act, introduced by Senator Metzenbaum and cosponsored by Senator Simon from our state.

The Illinois Public Action Council is the state's largest public interest organization with 168,000 member families in Illinois. Over the last fifteen years we have advocated for the consumer on a wide range of issues including energy prices, insurance rates, health care costs and consumer rights at both the state and federal level. We are also the state affiliate of Citizen Action, the nationwide public interest organization of 2 million members that works on the same broad array of consumer concerns.

This morning I wish to strongly endorse the proposed legislation and the protections it will provide to middle and lower-income families by guaranteeing a genuinely free market for consumer goods.

Opponents, of course, argue that strong federal regulations regarding price fixing and anti-competitive practices amount to government interference in the marketplace.

In fact, it is quite the opposite. A "free" market in the true sense -- the sense of Adam Smith -- is one that is free for the consumer, not one that is free for the producer. Such a market can only be truly competitive when no single market player has the ability to fix the price of the product.

Rather in a free market it is the law of supply and demand that sets the price. Intimidation of the retailer by the producer in order to secure a single high price provides no long-range benefit to the consumer.

It should be noted as well that the very same opponents of this legislation frequently invoke the benefits of the free market and competition when they wish to avoid government oversight of their activities. Yet they seem to quickly forget those benefits when it is the intention of government to encourage that market by outlawing price-fixing and other uncompetitive practices.

Recent history has clearly shown that consumers do indeed benefit from active price competition for consumer goods. This is abundantly evidenced by the explosion of discount outlets for consumer electronics, major appliances, apparel and other items since the Congress overturned state price restrictions in 1975.

This trend has meant real dollars in the pockets of average consumers, and has been particularly important for middle and lower-income families struggling to make ends meet. It has been estimated that the average American household saves $500 a year from the lower prices available from discounters, amounting to as much as $23 billion every year.

The proposed legislation would ensure that those benefits to the consumer are extended by codification of the per se rule on price-fixing, ensuring bona fide price-fixing cases are fully considered by the courts, and preventing the intimidation of retailers by producers for pricing policies.

The benefits of such legislation to the consumer are obvious. How could it possibly be argued that Houston area consumers would be somehow better off if they could only buy Sharp Electronics products at a single, high-priced outlet? Yet such limited options will be the direct result of allowing the Supreme Court's ruling on the Sharp and Monsanto cases to stand as the antitrust law of the land.

It is also clear that the proposed legislation has been carefully drafted to ensure that consumer concerns about services and quality, as well as the legitimate contract rights of manufacturers, are retained. The baby has not been thrown out with the bathwater.

On behalf of Illinois consumers I would strongly urge committee approval of S. 865, the Consumer Protection Against Price-Fixing Act, and its speedy approval by the full Senate. Thank you.

* * *

Senator **Metzenbaum**. Professor Pitofsky, we are very happy to have you appear before us again. We haven't seen you for some time, but we are happy to have you back with us.

STATEMENT OF ROBERT PITOFSKY, PROFESSOR OF LAW, AND DEAN, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. **Pitofsky**. Thank you, Senator. I am delighted to be here and to testify on this fine and, I think, important piece of legislation. As I understand it, Congress has long been aware that the rule is that vertical price-fixing agreements are illegal, and Congress has supported that rule.

This bill would be a signal that discounters are legitimate businessmen who deserve to be protected, and that direct or indirect attacks on the *Dr. Miles* rule are not consistent with the will of Congress.

I believe this controversy is based, in part, on a caricature. It seems to me that the people who challenge the *Dr. Miles* rule have successfully made the argument that there are two types of dealers. One type is high-price, high-service; the other type is low-price, no-service. And the second group is characterized with the epithet "free riders." The notion is of a cheap, sleazy group of operators who are taking advantage of honest businessmen.

I would propose a different model of retailing. I agree that there are two types of dealers—high-price, high-service, and low-price. But the fact of the matter is that the low-price dealers are often low-price, first of all, even though they provide much or the same or similar services; second, because they are more efficient; or, third, because they are prepared to accept a lower profit on the retail margin and they want to pass that along to consumers in the form of lower prices and a higher volume of sales. I think that is a more realistic description of what is going on in retailing.

Now, why do I think the free-rider argument is nonsense? Well, first of all, historically, if you look back and see where vertical price-fixing was attempted during the fair trade period, you will see that consistently it was on products like jeans, ammunition, bird food, cosmetics, men's underwear. What in the world is the service on bird food that these economic challenges are so upset about?

Second, as Mr. Creamer just said, if the manufacturer really cares about service, there is a simple way of doing it. All you have to do is contract with the dealer and say you must advertise, you must provide warranty support; if you don't, I will cut you off. That is perfectly legal, and that is a way of getting the services accomplished.

Now, there is one group of manufacturers and dealers for which the free-rider argument has an unusual validity, and that is high-tech products—stereo equipment, video recorders, and so on.

Where it is possible, without salesperson explanation, the manufacturer would be injured. But the answer there is also simple, and that is that the courts can read into the *Dr. Miles* rule a narrow exception. What we do not need is decisions which undermine the

Dr. Miles rule for every product across the board, including those in which services are not involved.

Now, briefly, on the two cases that have provoked this legislation, I read *Monsanto* as doing nothing more than clarifying the law and telling the lower courts not to overread what the Supreme Court said.

I think the phrase "the major contributing cause" is an improvement. Though I didn't say this in my written testimony, I am not sure what the word "contributing" adds to this. "The major cause" seems to me to be adequate.

The real problem here is the *Sharp* case, and just to restate it briefly because I know you are aware of the facts, a high-priced outlet gave the manufacturer an ultimatum, saying cut off the discounter or you are going to lose my business.

The manufacturer clearly agreed to accept the ultimatum. There was an agreement, and the Court, in an astonishing opinion, concluded that because the manufacturer and the high-price discounter had not agreed as to a specific price, that is not price-fixing. It is astounding.

In my testimony, I offer as an example—this episode happened in Houston. Suppose there was a high-price dealer and a low-price dealer in Dallas. What would they think of what happened in Houston? Of course, they would think that the manufacturer is open to receiving ultimatums and will cave in to them, and if the ultimatum is given, he will cut off the discounter.

And the discounter in Dallas will say to himself, if I don't abide by these suggested prices, I am going to be cut off. Any reasonable person would see that, and to say that is not price-fixing, frankly, is absurd.

Second, I am troubled about the *Sharp* decision because it will be difficult to contain. Any sensible business man or woman will now say we can agree to anything we want; we can offer and accept any ultimatum we want, but when we are finished, let us make sure the lawyers put a memo in the file saying, remember, we never agreed as to price level. That guts the *Dr. Miles* rule and, it seems to me, is unwise.

I thank you for this opportunity to speak here today.

[The statement of Mr. Pitofsky follows:]

TESTIMONY OF ROBERT PITOFSKY

Professor of Law and Dean

Georgetown University Law Center

Before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

Concerning

CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989

June 1, 1989

I appreciate the opportunity to testify in these hearings concerning S.865, the Consumer Protection Against Price-Fixing Act of 1989 and, more generally, about the proper interpretation of antitrust law with respect to vertical distribution arrangements. This testimony is based on my experience as a Commissioner at the Federal Trade Commission, and as a long-time teacher and scholar in the field of antitrust.

I believe the legislation being considered by the Senate is exceptionally important. This bill would help to insure free and flexible distribution systems, with prices determined by business people closest to the consumer, and that system is more likely to produce quality products at reasonable prices. Study after study has shown that products sold at prices determined by the manufacturer and not the retailer will cost the consumer more; no study shows that additional services (if any) that may result are worth the price.

Beyond that important but narrow issue, one must take into account that there has been a broad attack on much antitrust enforcement, from conservative quarters of the academic world for the past 15 or 20 years, and from government enforcement officials since 1980. Some of these critics believe that only horizontal cartels, horizontal mergers leading directly to monopoly power, and a few rare instances of predation regularly should be the subject of antitrust enforcement.[1] They also appear to suspect the advisability of per se rules in virtually all antitrust enforcement. Unwillingness to enforce the per se rule against minimum price-fixing -- i.e., unwillingness to give credence to the Supreme Court's Dr. Miles decision[2] -- is part of that assault.

Essentially the anti-Dr. Miles argument has been that because a concern for efficiency is plausible in some situations in which vertical price fixing is imposed by manufacturers on dealers, the per se rule of illegality pursued by the Supreme Court since Dr. Miles was decided in 1911 should be abandoned. They would prefer a rule of reason standard. I will point out later in this paper why I feel the "efficiency" explanation for resale price maintenance is unrealistic. It is also interesting, however, that the same Administration figures who refuse to follow the Supreme Court per se mandate against vertical price fixing have failed to bring a single vertical minimum price fixing case in over eight years -- on a per se or rule of reason standard. In short, I suggest that the goal of these critics is not to amend a particular approach to distribution arrangements -- *i.e.*, not simply to adjust from *per se* to rule of reason in narrow circumstances -- but really to legalize vertical price fixing in virtually all settings.

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[1] For example, see Bork, The Antitrust Paradox: A Policy At War With Itself (1978).

[2] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The Dr. Miles decision has been reaffirmed by the Supreme Court frequently, and as recently as 1987 in 324 Liquor Corp. v. Duffy, 107 S. Ct. 720, 724 (1987).

Finally, if the anti-*Dr. Miles* forces prevail on the question of appropriate treatment of vertical price fixing, it may be difficult to contain that result. Alleged efficiencies can be asserted with respect to horizontal price fixing and market division, as well.[3] It is therefore important that there be a clear sign from Congress that *per se* approaches to extremely anticompetitive behavior ought to be maintained, as the Supreme Court has frequently said, rather than challenged or ignored in the enforcement agencies.

S.865 has three essential ingredients that I would like to discuss today:

1. It would codify the long-established principle first asserted by the Supreme Court in 1911 in

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[3] For example, efficiencies were alleged, but the Supreme Court nevertheless imposed a *per se* rule, with respect to horizontal market allocation in *United States v. Topco Associates*, 405 U.S. 596 (1972). One can predict with some confidence that if the course of decision proceeds unchecked from *Sylvania* to *Monsanto* to *Sharp Electronics* and beyond, the next step will be an assault on horizontal *per se* rules. That result, including the overruling of *Topco*, is foreshadowed in Judge Robert Bork's opinion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert denied*, 107 S.Ct. 880 (1989).

Dr. Miles that minimum resale price fixing agreements are illegal per se;

2. It would clarify the meaning of the Supreme Court's recent decision in Monsanto,[4] that plaintiffs can get to a jury with claims of illegal dealer termination if they can show that a request, demand or threat by a competing dealer was "the major contributing cause of such termination . . .; and

3. It would overturn the result in Sharp Electronics[5] which held that an agreement between a supplier and a retailer to terminate a competing retailer is not illegal where the complainant and the supplier did not agree on a specific price or price level.

All of these goals seem advisable to me, and I believe S.865 is well designed to achieve those results.

1. Confirmation of Dr. Miles. I will be brief in my discussion of the validity of the Dr. Miles rule because I know the Committee has considered this question for several years.

A starting point in any discussion of enforcement policy with respect to vertical price fixing should be an appreciation that horizontal price fixing is the most pernicious of anticompetitive and anticonsumer arrangements. The courts have recognized, however, that if a manufacturer sets the minimum prices at which its wholesalers or retailers can sell a product, the effect of these vertical restrictions in many respects is the same as that of a horizontal dealer cartel. In addition, vertical price fixing can stabilize minimum prices at the manufacturers' level. Manufacturers participating in a horizontal price fixing arrangement may be tempted to cheat by offering price concessions to some buyers. But if the manufacturers agree to adopt vertical minimum price fixing arrangements with dealers, there are less incentives to cut a price in the hope of achieving greater sales volume. Since the dealers cannot pass along the price cut to consumers, they probably will pocket the manufacturers' price reduction -- and hence the price reduction at the manufacturer level is much less likely to occur.

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[4] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

[5] Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 515 (1988).

Opponents of the Dr. Miles rule have pointed out that a manufacturer for its own reasons may conclude that a particular mix of price and service competition is best to sell its products. Services could include advertising, dealer demonstrations or post-sale warranty programs. Dealers may hesitate to make investments in services if other dealers (the now notorious "free riders"), unburdened by comparable costs, can offer the same product at lower prices.

It is important to emphasize that the "free rider" explanation for vertical price fixing is a totally theoretical matter. No study has ever demonstrated that manufacturers regularly or frequently engage in minimum resale price fixing to ensure the provision of services, and many products as to which minimum price fixing has been tried (jeans, cosmetics, bird food, men's underwear) involve few if any services. Even if a manufacturer does have a legitimate desire for services, those can be introduced through means other than vertical price fixing. Specifically cooperative advertising arrangements or warranty support can be contracted for without eliminating intrabrand competition on the retail price of the product.

Finally, if there are some "free rider" situations -- i.e., market situations in which desirable services are likely to be driven out by price cutters -- that situation can be handled fairly by adoption of narrow, carefully defined exception to a per se rule.[6] For example, minimum vertical price arrangements could be permitted where a defendant could demonstrate extreme examples of "free rider" problems. That approach would preserve the efficient and beneficial per se rule and place the burden of proof on displacing the rule where it belongs -- on the party asserting the free rider claim.

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[6] An exception to a per se rule is not unprecedented; see United States v. Jerrold Elec. Corp., 187 F.Supp. 545, 556-58 (ED Pa 1960), aff'd per curiam, 365 U.S. 567 (1961), authorizing "new entrant" exception to the per se rule covering tie-in sales.

Ordinarily, I would not advocate legislative enactments establishing per se or any other evidentiary rules in the antitrust area. Antitrust was designed to be a flexible system of business regulation and that approach has worked well. It is only because of the unusual governmental nonenforcement of law that we have seen in this area in recent years that it becomes necessary (regrettably) for Congress to reassert its will through legislation.

2. Clarification of Monsanto. In Monsanto Co. v. Spray-Rite, dealers had complained to Monsanto about price cutting activities by a competing dealer, Spray-Rite, and Monsanto, in response to those complaints, terminated the price-cutting dealer. The trial court found that termination was a result of a conspiracy between Monsanto and its complaining dealers, and the Court of Appeals affirmed. The Supreme Court also affirmed -- concluding that there was clear evidence that the complaining dealers and Monsanto had a

commitment to a common scheme to achieve a price fixing result.

The case is notable because the district court had charged the jury that an agreement could be found between the complaining dealers and Monsanto where a termination follows or is "in response to" distributor complaints. The Supreme Court sensibly noted that the mere fact that termination was subsequent in time to the complaints is not enough to show a concert of action, and that additional evidence is required to ensure that the complaining dealers and the manufacturer are not pursuing parallel but independent (and non-conspiratorial) goals.

Lower courts have overreacted to the Supreme Court decision and have imposed exceptional burdens on plaintiffs trying to get to juries with evidence of the kind of conspiracy the Supreme Court actually found in Monsanto.[7]

The key point to recall about Monsanto (and the provisions of S.865 clarifying Monsanto) is that defendants are denied no legitimate defense. If they have a claim that circumstantial evidence about concert of action with respect to a termination is misleading, they can assert it at the trial. Moreover, questions like the one put to the jury in Monsanto -- extracting true motives from a hodge-podge of possibly conflicting evidence -- is exactly the kind of role that juries perform well. Finally, it is easy for dealers to avoid even the remote threat of a conspiracy charge. If a rival is selling at lower prices, all it need do is meet or beat those lower prices -- that is, compete -- but it should not complain about those prices to a supplier. And the manufacturer can protect itself by never cutting off a dealer in response to a dealer ultimatum or, worse yet, coerce the supplier into terminating the rival.

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[7] For example, see Garment District Inc. v. Belk Stores Services Inc., 799 F.2d 905 (4th Cir. 1986).

S.865 is preferable to previous versions of the same bill because it makes clear that its provisions do not apply to maximum price fixing and also that the complaint by the distributor must be "the major contributing cause of [a] termination or refusal to supply." Both changes seem well designed to respond to arguments addressed to earlier versions of the bill.

3. Legislative Overruling of Sharp. In the Sharp case, a non-discounter distributor of electronic calculators (Hartwell) complained to its supplier (Sharp) about low prices being charged by another dealer (Business Electronics). Eventually Hartwell gave Sharp an ultimatum -- either terminate the price cutter within 30 days or it would discontinue its distribution

arrangement with Sharp. Sharp terminated the discounter promptly.

The record seemed clear that the termination was a joint decision by Hartwell and Sharp to eliminate a distributor because it was a price cutter. Sharp made no claims and offered no evidence that services were essential in the sale of business calculators or that Business Electronics had failed to provide required services. Under Monsanto, one would have expected that the question of whether there was an agreement to determine minimum resale prices would go to the jury (which it did), and that a jury verdict in favor of the terminated dealer (which was reached) would have been sustained. But the Supreme Court concluded that there was no specific agreement between Hartwell and Sharp as to the prices Hartwell would charge since all Sharp had ever done was to suggest minimum resale prices. The Court reasoned that in the absence of an agreement on specific prices, the dealings between Hartwell and Sharp did not constitute an agreement that fixed resale prices.

The Supreme Court's conclusion in Sharp is surprising. The agreement between Hartwell and Sharp obviously had an effect on the discounter's price for Sharp products since it was terminated as a distributor for Sharp. Predictably it would have an effect on

Hartwell's price since it is at least probable ("certain" may be more accurate) that Hartwell would follow suggested minimum resale prices by Sharp in the future as a result of the Hartwell-Sharp agreement to eliminate Business Electronics.

But the course of dealing would have a broader effect than that. The controversy over pricing between Hartwell and Business Electronics took place in Houston. Suppose there were two Sharp distributors in Dallas -- one following suggested minimum resale prices and the other a discounter. What lesson would each extract from the Houston episode? Any sensible discounter would see that it could continue to sell for Sharp only if it abided by minimum resale prices; if it did not, it ran the risk that a powerful high-priced distributor could coerce Sharp into terminating the discounter. And the non-discounter would know that Sharp was open to arrangements -- by agreement with complainants -- to terminate a discounter. In short, any sensible business person would see that the course of dealing between Hartwell and Sharp was an agreement to enforce minimum resale price levels, and the agreement would have an effect on prices in Houston and elsewhere.

The _Sharp_ decision is even more ominous because of its capacity to expand so as to undermine all enforcement against complaining dealers who coerce manufacturers to terminate discounters. If Sharp remains the law, the high-priced dealer apparently could engage in any type of invitation or coercion of its supplier, and the supplier can accept the invitation or knuckle under to the coercion in the most explicit terms, and yet not violate the antitrust laws. All they need do at the end of their course of dealing -- no matter how many discounters they have agreed to terminate -- is to make sure there is a memo in some file saying more or less the following:

> "Remember: we don't agree as to what price you (the remaining high-priced dealer) will charge."

That memo is a safe passage to any type of vertical price fixing agreement they choose to pursue.

There are three other respects in which the majority opinion in Sharp is disturbing:

First, the majority asserts that "interbrand competition is the primary concern of the antitrust laws . . . ." That is not a premise derived from Sylvania or Monsanto, but rather a long step in the direction of thwarting Congress' intention to deal with intrabrand vertical price fixing. All the Supreme Court said in Sylvania was that "The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition . . ." and then called for a balancing of these two sets of effects. If all antitrust comes to care about is interbrand competition, then any arrangement, vertical or horizontal, among dealers of the same branded product -- beer, toothpaste, wrist watches and on and on -- will be insulated from antitrust challenge as long as there is vigorous interbrand competition. That is a radical change in antitrust policy, going far beyond what the courts had previously asserted.

Second, the majority opinion extracts from Sylvania and Monsanto a conclusion that "price cutting is frequently made possible by 'free riding' on the services provided by other dealers." That is quite a jump from what Sylvania actually said. The majority opinion in Sylvania simply observed that economists have asserted some plausible justifications for vertical non-price restrictions, one of these justifications is to facilitate the providing of services to consumers, and there might be occasions when these services would not be provided because of the so-called "free rider" effect. It did not conclude (nor has any study concluded) that free riding frequently prevents the supplying of services -- much less that the elimination of free rider problems is a principal reason for the adoption by manufacturers of minimum price restraints.

Third, the Court in Sharp upheld the termination even though there was no real evidence of Sharp's need for desirable services or of "free riding." Thus, the anti-Dr. Miles forces successfully have insisted on a more flexible approach in the law to deter free riders, and now we find the Supreme Court exonerating behavior without any indication that free riding was involved.

Legislation which will overturn the result in a decision that contains so much questionable reasoning seems particularly appropriate.

In Sharp and elsewhere it has been argued that complaining high priced dealers should be allowed to coerce or induce manufacturers to cut off discounters in order to bring the law with respect to resale price maintenance in line with the law with respect to exclusive dealing. Specifically, the claim is made that the manufacturer can appoint exclusive distributors in defined territories (even at the invitation of a distributor), and those exclusive territorial arrangements may eliminate price cutting and price cutters as effectively as the termination agreed to in Sharp. That argument seems to me erroneous for at least two reasons:

1. Even if it were true that exclusive dealerships eliminate price competition to the same extent as resale price maintenance, that would not be a

reason to treat exclusive dealing and price fixing on the same footing. As the Supreme Court has noted many times, there are efficiencies and business justifications for exclusive dealerships -- benefiting both the manufacturer and the dealer -- which are not present with respect to price fixing.[8] For example, exclusives give the dealer a secure source of supply, price protection during the course of the contract against inflation or other changes, and frequently the opportunity to reduce transaction costs. For example, if an oil company agrees to supply a service station regularly and periodically, the service station can rely on the contract, and need not construct large storage tanks to maintain inventory against an abrupt termination of supply. None of these types of efficiencies is present with respect to naked price fixing.

2. It simply does not follow that because a dealer has an exclusive, its prices will be the same as those established by the manufacturer through vertical price fixing. The dealer gets to make the call on price levels during the period of the exclusive contract, regardless of what the manufacturer thinks. The dealer, responding to market pressures, may set the prices

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[8] See, e.g., Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).

higher or lower or at the same point as the manufacturer proposes -- a sort of market freedom that the antitrust laws in this country have long valued and protected.

CONCLUSION

If S.865 were enacted into law, that would not mean manufacturers would have no way of controlling pricing or other distribution practices within their sales networks. They could enter into the following arrangements, among others:

1. They could select dealers with a reputation for supplying services and even announce that they would cut off any dealers who refused to live up to commitments to furnish specified services; if the dealers failed to live up to service commitments, they could be cut off; see United States v. Colgate & Co., 250 U.S. 300 (1919);

2. To protect against any possible "free riders," they could, under a rule of reason, designate territories in which their dealers could sell or classes of customers to whom they could sell; see Continental T.V. Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36 (1977);

3. They could cut off dealers that they believe are performing inadequately for any reason -- so long as they do it unilaterally and not by agreement with other manufacturers or with dealers.

All this bill would make clear is that the manufacturer cannot terminate a discounter pursuant to an agreement with other dealers who compete with the discounter.

The attack on discounting generally, and on the *Dr. Miles* rule which tends to protect discounters, grows out of relatively recent tendency to describe discounters with the epithet: "Free riders." That calls forth images of lazy cheats who take advantage of honest businessmen by selling at low prices without accompanying services. I have already said that if there are rare instances in which such behavior occurs, an exception to the *Dr. Miles* rule could be designed.

I urge a different model of modern retailing -- one far more likely to match reality than the "free rider" scenario. Assume ten dealers of the same branded product, nine of whom are selling at roughly the same high price. The tenth dealer works longer and harder, is more aggressive, handles purchasing, inventory and sales more efficiently -- and seeks to pass those efficiencies on to customers in the form of lower prices in order to expand its sales. In short, it competes. I believe this bill will protect the capacity of that dealer to continue to invigorate a distribution system.

GEORGETOWN UNIVERSITY LAW CENTER

Office of the Dean

June 22, 1989

Senator Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
  Monopolies and Business Rights
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Metzenbaum:

I appreciate the opportunity to reply to questions put to me by Senators Thurmond and DeConcini with respect to my testimony concerning S.865. The questions and answers are set out below:

A. Questions by Senator Thurmond.

1. Mr. Pitofsky, it is difficult from your prepared testimony to determine how you really feel about the Monsanto decision. Do you in fact agree with the court's reasoning and result?

I believe Monsanto was correctly reasoned and decided. It made clear that the simple conjunction of complaints about price cutting followed by a dealer cut-off should not be enough to get to the jury on the question of an agreement between the complaining distributor and the supplier to fix resale price. The court concluded that "something more" than a coincidence in timing -- cut-off following complaints -- would be necessary. It then examined the evidence and found the "something more" to be present.

The problem is not with Monsanto but with some lower courts that have overreacted to the decision and made it extremely difficult for plaintiffs to get to a jury on the "agreement" issue. I understand that the purpose of S.865 is to clarify the Monsanto result.

2. The proponents of S.865 claim that this bill doesn't really overrule Monsanto, but rather that it

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provides needed clarification. In my view, it either overrules *Monsanto* and provides a more lenient standard of proof, or it is no different than what the courts said in Monsanto, and is not needed. What is your view?

As I indicated above, the clarification of *Monsanto*, as set out in S.865, would be useful. I see no suggestion in that bill of any intention to return to the pre-*Monsanto* situation in which a simple complaint followed by a cut-off could be interpreted by a trier of fact as the equivalent of an agreement.

3. Do you really believe that it is wise to codify the per se rule and preclude courts from ever examining whether in some circumstances, the rule of reason is more appropriate. In fact, if such legislative action had been taken earlier, the court would never had been able to revisit vertical non-price restraints as it did in *GTE Sylvania*. It is a judicially created rule designed to deal with evidentiary requirements. Shouldn't we leave it as a judicial rule?

As I stated in my original testimony, I agree that ordinarily Congress should not codify *per se* rules of illegality. Not only do business conditions change, but we frequently learn more about practices that appeared (but in fact were not) anticompetitive.

The problem that needs to be addressed with respect to resale price maintenance concerns the enforcement agencies and not the courts. For over eight years, we have witnessed the extraordinary spectacle of the enforcement agencies not bringing a single case challenging vertical price restraints -- under either a *per se* or a rule of reason approach -- even though the case law remains clear that vertical price fixing agreements are illegal *per se*. The situation is especially troublesome because the last time Congress addressed the issue -- *i e*., when in 1975 it repealed the provisions of the Miller-Tidings and McGuire Acts allowing vertical price fixing (under "fair trade" laws) at the option of the states -- it could fairly be inferred that Congress concluded that the *per se* approach was correct. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). This action by Congress was characterized by the Supreme Court as an expression of "approval of a *per se* analysis of vertical price restrictions. . . ." Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51, n.18 (1977).

Thus the enforcement agencies, relying on their view of the economics of vertical restraints, have in effect dealt the courts and Congress out of the game through non-enforcement. That situation is so exceptional (and in my opinion unjustified) as to call for a clear statement by Congress to the enforcement agencies of its views with respect to per se illegality of minimum resale price agreements.

I know that many are uncomfortable with the per se rule in this area because they believe resale price maintenance in some circumstances is justifiable. But if it turns out that there is some justification for permitting vertical price fixing in narrow circumstances -- for example, to prevent free rider problems with respect to sale of high tech products -- I see no reason why the courts could not reach that result either by carving out an exception to the per se rule (compare United States v. Jerrold Elecs Corp., 187 F.Supp. 545, 556-58 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) authorizing a "new entrant" exception to the per se rule covering tie-in sales) or through a "characterization" approach which would justify a rule of reason where the defendant could demonstrate extreme examples of "free rider" problems (cf. Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

4. If we overrule Sharp, aren't we really expanding vertical price fixing to include any agreement that affects prices, and wouldn't that include many agreements that are legal?

I don't think so. Prior to the Supreme Court decision in Sharp, there were recurrent problems in characterizing particular arrangements as vertical price restrictions as opposed to vertical non-price restrictions. But there are limits to that "problem." I don't recall it has ever been seriously suggested that exclusive dealing contracts, location clauses, or exclusive distributorships are the equivalent of resale price maintenance because they have an indirect effect on price.

Of course, there can be close cases with respect to "characterization." In Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978), cert. denied, 439 U.S. 833, a court faced the difficult question of deciding whether an agreement that a distributor sell outside an assigned area at no less than list price was a territorial or price restriction. The court decided it was a non-price restriction and analyzed it under a rule of reason.

The Supreme Court's Sharp decision, focusing on circumstances in which complaints by dealers and subsequent terminations of price cutters constitutes an "agreement," would not seem to affect the "characterization" problem one way or another.

B. Questions from Senator DeConcini.

1. In the distribution of high tech products that require extensive pre- and post-purchase service, isn't it important to give manufacturers flexibility in choosing retailers and adopting means to insure that appropriate service is offered? Could S.865 as drafted chill such efforts? Do you have any recommendations as to ways in which the bill might address this problem?

Ordinarily, I believe the decision about the proper mix of service and price should be left to retailers. After all, they own the product (if it were otherwise and they were simply agents, the manufacturer could set the price) and are closer to customers and customers' desires than the manufacturer.

But even if manufacturers should have some flexibility in inducing distributors to provide services, they have it now and will have it regardless of enactment of S.865. Manufacturers can select only those dealers with a reputation for providing service; they can assert conditions on which they will deal (including required provision of service) and cut-off those dealers who fail to perform; or they can separately contract with the dealers to provide services.

It has always struck me as surprising that practical people really think manufacturers introduce resale price maintenance (i.e., raise the retail price of their products) in order to induce dealers to supply services. What makes the manufacturer think the dealer will supply exactly the right kind and amount of service; why won't the dealer just pocket the money? Suppose the dealer carries several brands of the same product. Can anyone really imagine that a sales person, offering an explanation of the qualities of one product, would tell a customer he or she will not discuss the qualities of another product, because of the presence or absence of resale price maintenance?

In short, I think manufacturers have much ability at present to induce dealers to provide services, manufacturers rarely would use resale price maintenance to induce services, and resale price maintenance is not only unnecessary but would have other anticompetitive effects.

2. The bill now requires per se treatment for agreements to terminate a dealer because of the dealer's "pricing policies." Don't you think that is a little vague, since almost any reason for termination might be considered to affect or have a relationship to "pricing policies?" Couldn't the bill expose virtually all agreements to terminate a dealer to per se treatment?

I recognize the ambiguity, but I doubt it is really a problem. Suppose a manufacturer terminates a dealer for selling outside of an assigned territory or to a prohibited class of customers. Under the Supreme Court's Sylvania decision (Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the agreement that was violated, leading to the termination, would be treated under a rule of reason. But the dealer's decision to sell outside an assigned territory or to an inappropriate class of customers is not a "pricing policy" -- although I recognize that it might have an effect on price -- and hence would not be treated under a per se rule. Put another way, a dealer policy that the manufacturer disapproves of, leading to termination, will only expose the termination to per se treatment if it relates to the dealer's price. I see no way to draft the provision any more clearly.

3. Are you familiar with S.430 which was reported by the Judiciary Committee last year? Why isn't the language in that bill adequate to protect

consumers and discounters? Why do we need to take the broader more drastic approach of S.865?

As I am sure you appreciate, in several respects S.865 is narrower rather than broader than S.430. Its provisions apply to minimum and not maximum price fixing, and it permits a claimant to get to a jury only if it can show that a termination or refusal to supply occurred because of a demand or threat by a competitor which was "the major contributing cause of such termination or refusal to supply." I supported S.430 without those modifications, but believe now that S.865 is superior in those respects.

The principal way in which S.865 is broader concerns the language designed to overrule the Sharp opinion. For reasons discussed in my testimony, I believe not only that the result in Sharp was wrong, but that its reasoning will be difficult to contain because of some of the sweeping statements in the majority opinion. In order to prevent the rule of per se illegality for vertical price fixing from being eroded indirectly, I believe it is essential that Congress overrule the Sharp opinion.

4. You stated that "this bill would make clear . . . that the manufacturer cannot terminate a discounter pursuant to an agreement with other dealers who compete with the discounter" and that the manufacturer "could cut off dealers that they believe are performing inadequately for any reason -- so long as they do it unilaterally and not by agreement with other manufacturers or dealers." Isn't this what the law currently provides under the Sherman Act? Doesn't S.865 go further and require the manufacturer to bear the burden of proving a negative -- that the termination was not a result of a competitor's complaint?

I believe my statements do describe the present law except for the Supreme Court's recent decision in Sharp. For reasons summarized in my earlier testimony, I believe that case should be overruled.

As to the burden of proof under S.865, Section 3(b) provides that there is a contract combination or conspiracy "if the claimant presents sufficient evidence that such a person . . ." was cut off at the request of a competitor (emphasis added).

Monsanto and the bill make clear that the burden of proof remains on the claimant to show "something more" than termination following a complaint.

5. S.865 provides that a competitor's complaint must be the major cause of the plaintiff's termination as a distributor. Different courts interpreting this provision may construe this differently and, as with the Monsanto standard, come up with varying results. Given this, does S.865 solve the problems you perceive with the existing Monsanto standard?

Not fully. Judges could still defeat Congress' purpose by regularly finding that terminations following complaints occurred for reasons other than the complaint. I assume that would happen only if there is evidence in the record of other reasons for the termination. In any event, that is a price that must be paid, since I believe it should remain a valid defense to a manufacturer to show that the termination occurred, regardless of the nature of the complaint, because the manufacturer was dissatisfied for non-price related reasons with the performance of the distributor.

Sincerely,

Robert Pitofsky

cc: Senator Thurmond
Senator DeConcini

Senator **Metzenbaum**. Thank you very much, Dean Pitofsky.

We will adopt a 5-minute rule, including myself, with a limitation of two rounds. The time is getting quite late. I don't expect to use two rounds.

Let me just ask you, Mr. Zimmerman, your company is doing well, as are other large discount chains. Do you believe the success of some in your industry means all is right with the world with respect to resale price maintenance, and even if your companies are doing well, what will be the ultimate impact on the consumer if no action is taken by the Congress, in your opinion?

Mr. **Zimmerman**. Senator, I don't think the issue is really whether or not the retail industry or our particular company is doing well. I think it is what effect it has on our customers, the ultimate consumer of the United States.

By charging higher prices, obviously it is going to take more money; they are going to be able to buy less products. You are going to slow down the economy. Price competition makes people more aware, puts more people to work, enables people to have a higher standard of living, and benefits the whole world.

Senator **Metzenbaum**. Does your own company or do other discounters provide service for the products you sell, and do you think that resale price maintenance is necessary in order to assure consumers that they get service and experience necessary to sell the products, as is claimed by those who oppose this bill?

Mr. **Zimmerman**. We do service some of the products that we sell. Most of the merchandise that we sell doesn't require service. We offer the same warranty as to the other high-priced merchants, which is a warranty provided by the manufacturer.

For example, in traffic appliances and things like that, nobody, other than certain local repair stations across the country, repair those products. We offer the same service as does everyone else that we will either deliver it to that repair station, if there is an overthe-counter replacement guarantee. We will have the same policy as all other type retailers.

Senator **Metzenbaum**. Dean Pitofsky, some of those opposed to this bill suggest that the *Sharp* decision is a correct and narrow reading of the antitrust law. Do you agree with that?

Mr. **Pitofsky**. No. I have already suggested to you that I think it was both a surprising and, unfortunately, a wrong decision. Let me add a word to what I have already said about the way in which this decision could be an opportunity to undermine the *Dr. Miles* rule from all points of view.

The conservative economist group in academia has succeeded in raising questions about *Dr. Miles* with the claim that vertical price-fixing is different than horizontal price-fixing.

Horizontal price-fixing, for example, among dealers would clearly be bad. The two dealers in Houston could never have agreed with each other. They could go to jail for doing that, but the manufacturer can impose a price on each of them.

Even if one were to accept that interpretation, the problem is that when the high-price dealer complains to the manufacturer and gets the low-price dealer cut off, that is not vertical anymore; that is horizontal.

And it seems to me the *Sharp* case has missed that point and is essentially clearing a kind of horizontal pressure on discounters which ought not to be permitted.

Senator METZENBAUM. There is concern that reversing the Sharp decision would damage the holding in the *GTE Sylvania* case because a jury would not be able to distinguish between a price versus a nonprice restraint.

Take the example of a manufacturer trying to change his distribution network. Would you agree in that instance that a manufacturer is likely to have ample evidence for the jury of his nonprice reasons for so doing—in other words, market studies, system-wide changes, et cetera?

Mr. PITOFSKY. Yes, I think so, Senator, although to be fair about it, the courts have left lower courts and juries in a difficult position. It is, at times, difficult to distinguish between price and nonprice competition.

For example, suppose the alleged nonprice restraint is you can sell to anybody you want, but not to transshippers. I don't know if that is really a customer restriction or a price restriction, but that is unusual.

The typical situation is one in which the manufacturer says sell in Brooklyn, don't sell in the Bronx. The alternative situation is one in which the manufacturer says sell at a dollar and don't sell at less.

Now, I agree with the statement in your question that there will be much evidence in the record—market surveys, documents, et cetera—to show the jury that what is going on is one thing or the other. They can tell the difference between an arrangement that says sell in Brooklyn, not in the Bronx, and an arrangement that says don't sell at less than a dollar.

Senator METZENBAUM. Thank you very much, Dean Pitofsky.

Senator Kohl, your questions, and if you would be good enough to preside while I step out to make a phone call, I will be right back.

Senator KOHL. I would like to ask a question, Dean Pitofsky. Several witnesses have mentioned the Justice Department in their testimony, but the Justice Department hasn't sought or brought a single vertical price-fixing case in 8 years.

What kind of signal do you think this sends to the marketplace?

Mr. PITOFSKY. Oh, I think that is a very important point, Senator Kohl. This bill must be seen in a broader context, and the broader context is an attack not on these narrow conspiracy issues, but on the *Dr. Miles* rule.

And I think in the marketplace, businessmen and their lawyers are increasingly coming to the conclusion that the government will not enforce the law against vertical price-fixing, no matter what the circumstances—services or no services, market share or no market share.

And I see this bill as a signal to the Justice Department that Congress is not happy with that situation.

Senator KOHL. What do you think motivates the Justice Department's inaction?

Mr. PITOFSKY. Well, it is this economic assault on antitrust, a very conservative assault on antitrust, which takes the position that the manufacturer rather than the retailer is in a better position to decide at what price the consumer buys the product; that the manufacturer may have an interest in a mix of price and service and it is in a better position than the retailer.

And I think that is fundamentally wrong and I think it is fundamentally inconsistent with what the Supreme Court and Congress have said for many years.

Senator KOHL. Mr. Creamer, Mr. Zimmerman, would you like to comment on those questions I have asked?

Mr. CREAMER. Well, from our point of view as a consumer organization, we are very concerned with the trend in the law and, as the dean has said, not with the specifics—not entirely with the specifics of the constraints placed by the *Sharp* decision. That is why every consumer organization in America has lined up in support of this bill.

Senator KOHL. OK. Mr. Zimmerman?

Mr. ZIMMERMAN. As far as we are concerned, from the day fair trade—and I must say I have a difficulty saying fair trade when it was really unfair trade. But, nevertheless, since the day that was eliminated, and then *Monsanto* and *Sharp* came, there has been a tremendous losing of our position with the manufacturers.

As I stated earlier in my testimony, the day that the *Sharp* decision was announced, within hours we were receiving phone calls from many of our major vendors addressing the problem of pricing; that they want our prices raised, they are going to do this and that and the other.

So the manufacturers today are virtually blatant in their demands, requirements, about pricing because they know nothing is going to happen to them. Nobody is going to take them to task.

Senator KOHL. OK. Dean Pitofsky, I would like to ask you a hypothetical question. Suppose in a particular market there is a full-price clock dealer and a discount dealer of clocks. The full-price dealers sells about ten times as many clocks as the discounter.

Suppose the full-price dealer tells the manufacturer that he is going to stop carrying the manufacturer's clocks because he can't compete on price with the discounter. However, the manufacturer, not wanting to lose his biggest client, but believing he has no choice, then terminates the discounter. After this, the full-price retailer changes his mind and continues to carry the manufacturer's product.

Is this permissible under the current law, and would it be permissible if S. 865 became law?

Mr. PITOFSKY. Senator, that is a splendid hypothetical. I usually get to ask the hypotheticals in class. I think that is the nub of this controversy. I do not think that would be permissible in the future, although I guess I would like to know a little more about all that was said between the parties.

But I think if this bill were to pass, it would not be permissible for the full-price dealer to give the manufacturer an ultimatum saying either you must cut off my competitor or I will leave you and start doing business with somebody else.

You are shaking your head.

Senator KOHL. I said here he never asked the manufacturer to terminate the discounter. He simply tells the manufacturer he can't do business with him any longer because of the reality of his being undersold.

Mr. PITOFSKY. And he just says, look, I am leaving you, I am going to your competitor as a dealer. I don't see any problem with that at all.

Senator KOHL. No, no, no. The big guy who is the regular-price dealer says to the manufacturer, the fellow down the street who only sells ten percent as much as I sell is underselling me badly, and therefore I have to stop carrying your merchandise, Mr. Manufacturer. Thank you very much, good-bye—no threat. You know, he just tells him the reality of the situation.

So the manufacturer, recognizing that this guy sells ten times as many clocks as the other guy, and understanding what he has been told, simply terminates the discounter, whereupon the regular-price dealer never terminates his relationship.

What is the legality of that arrangement under present law and under the proposed law?

Mr. PITOFSKY. I believe that that would be legal under the present law and legal under the proposed law.

Senator KOHL. Well, isn't that the way this all is going to happen, then?

Mr. PITOFSKY. The way it is going to happen? No, I don't think so.

Senator KOHL. Well, why not?

Mr. PITOFSKY. I think in the real world, naked hypotheticals like that don't happen. There is going to be a paper trail. We are going to hear more about what the reasons were. We are going to hear more about what services were provided by each party. We are going to hear more about ultimatums.

First of all, it is very rare that there are only two dealers. We are going to hear about what the third, fourth and fifth dealers had to say to the manufacturer, whether they agree with the first dealer.

It is a very rare situation, and I admit to you that it is a tough call for a jury to decide whether that was an ultimatum and the major contributing cause or the major cause, but I think juries are capable of disentangling that set of facts.

Senator KOHL. Well, I disagree with you, having been in business. I think that that is the way it does function with intelligent, smart, sophisticated people. You just call up the manufacturer and tell him the truth. You just say to him, I can't carry your merchandise anymore because the guy down the street is underselling me, and you hang up the phone and then you wait to see what he does.

Mr. PITOFSKY. Senator, you are a businessman and I am a business lawyer. What I hear more often is he calls up and he says the guy down the street is underselling me; he is unethical, he is un-American, do something about him.

Senator KOHL. As a lawyer, you would tell your retailer not to use those words.

Mr. PITOFSKY. Yes. They don't ask the lawyer before they make the phone call. [Laughter.]

Senator KOHL. The big guys do.

Mr. Zimmerman, what is your response to how this all works at a sophisticated level—and let us just assume sophistication?

Mr. **Zimmerman**. Well, I guess my best answer is I really don't know from a standpoint of what would happen, whether it would be legal or not. I have to defer that to the attorneys, but I know that there are instances where people do undersell us. We undersell other people, exactly as you stated in your business career, and decisions have to be made by each company based on its own particular situation as to whether they carry it or not carry it.

Senator **Kohl**. You are right. I just want to get back to what I was saying. As a big retailer, you are calling up the manufacturer and saying I have to drop one of your products because this little guy down the street is really hurting me bad, so I am going to drop your product from my mix.

I don't think that is unusual, Mr. Zimmerman, and I think those things occur. But Mr. Pitofsky is saying that he believes that that would be legal under S. 865. So I am suggesting that if that would be legal, it cuts the heart out of the bill if retailers intelligently exercise their right to discontinue a product because the guy down the street is selling it cheaper.

If they do it in the right way, which the dean is saying would still be legal, then are we here debating a full bill, a half bill, a quarter bill? What kind of a bill are we talking about?

Mr. **Pitofsky**. Well, I think it is legal, of course, because there is no agreement. So far, everybody is acting unilaterally.

Senator **Kohl**. Yes.

Mr. **Pitofsky**. So, that must be legal. Does that cut the heart out of the bill? I really don't think so because I don't think the full—your hypothetical assumes that the high-price discounter really doesn't care whether he carries A's product or B's product, and therefore he is just as happy to go over and carry B's product. That is not the way it works.

The full-price retailer wants A's product. What he doesn't want is competition from the discounter. He wants it both ways, and I think the phone calls and the letters and the documents will reflect that.

Now, if he is shrewd enough to do it in the way you said, it seems to me under this bill, under the Sherman Act, under the cases, since it is entirely unilateral, since nobody agreed to anything, I must conclude that it is legal.

Senator **Kohl**. Mr. Creamer.

Mr. **Creamer**. Well, the other question, it seems to me, is that kind of a play requires either that it be carried through or not. If the original retailer threatens to drop the manufacturer's products, the manufacturer has to decide if that threat will be carried through. And the manufacturer, as a consequence, is making a judgment as to whether or not the retailer thinks that his product is, in fact, superior to the competition's.

Clearly, your hypothetical presents a situation where the retailer could batter the manufacturer to put the discounter out of business, probably under the confines of this law. But I think it is clear, also, that there are many, many other circumstances covered by this law which currently under the *Sharp* decision are not covered. And, as a consequence, this law represents a material step in the direction of preventing the kind of intimidation that interferes in the retail marketplace.

Senator **Kohl**. OK. I would just ask one last question, gentlemen. Suppose a manufacturer who wants to continue selling his goods to both dealers is forced by the high-price dealer to terminate the discounter. He is stuck between a rock and a hard place. Does it make sense to hold him liable for making a reasonable business decision, or is it the purpose of this bill to ensure that a manufacturer won't be in that position?

Mr. **Pitofsky**. Exactly, exactly. I think this bill will create a set of laws in which the ultimatum is not delivered in the first place because the dealer will realize that having once delivered that ultimatum, it is liable as a conspirator under the law, as amended, once you get *Sharp* out of the way.

Therefore, it seems to me the manufacturer will be saved from being between a rock and a hard place by a bill like this.

Mr. **Creamer**. Just to reinforce that point, you know, as long as the manufacturer has a lot of leeway under the current *Sharp* decision, presumably he is subject to considerably more intimidation by the high-price retailer.

I mean, this creating a bright line, or at least a brighter line, protects the manufacturer from that kind of circumstance, and presumably is beneficial to the manufacturer, who might want a full-price retailer and a discount retailer in the same market.

I mean, let us recall there are many of those as well who would like to see their products marketed through a mix of retail outlets.

Mr. **Zimmerman**. I would think if it were possible to take a secret ballot of the manufacturing world that the manufacturers are probably more for this bill so that they will stay out of those compromising positions. So they really want it, too. However, some of them are afraid to speak out.

Senator **Kohl**. Thank you, gentlemen.

Senator **Metzenbaum**. Thank you very much, Senator Kohl. Thank you very much, gentlemen.

Our last panel consists of Alan Hald, chairman, MicroAge Computer Stores of Tempe, AZ; Joe Sims, of Jones, Day, Reavis and Pogue, testifying on behalf of the American Bar Association; and Bert W. Rein, of Wiley, Rein and Fielding, testifying on behalf of the Chamber of Commerce.

How do you pronounce your name, Mr. Rein?

Mr. **Rein**. Rein, sir.

Senator **Metzenbaum**. Mr. Hald, would you proceed, please?

STATEMENT OF A PANEL CONSISTING OF ALAN P. HALD, CHAIRMAN, ABCD: THE MICROCOMPUTER INDUSTRY ASSOCIATION, TEMPE, AZ; JOE SIMS, OF JONES, DAY, REAVIS AND POGUE, WASHINGTON, DC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; AND BERT W. REIN, OF WILEY, REIN AND FIELDING, WASHINGTON, DC, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. **Hald**. Thank you.

Senator **Metzenbaum**. You all know the five-minute rule.

Mr. **Hald**. Mr. Chairman, I welcome the opportunity to present before the committee. This is the first time that I or ABCD: The Microcomputer Industry Association has taken any stand for or against any Federal legislation. We do so because we feel that this particular legislation, which we are against, could be very detrimental to our industry.

In fact, we feel that in some ways our industry has fallen through the cracks. I know we talk a lot about clothing and furniture, but we seem to overlook computers and software. Although we have mentioned it here, there is a big difference between printed shirts and laser printers, and that big difference relates to satisfying clients, which is what we are all about as an association.

Again, let me reiterate that we are against S. 865, and I really would like to dispense somewhat with my formal presentation, since I have submitted that to the record, and basically cover some things that I think are important. A lot of these points that I otherwise would discuss will, I am sure, be amply represented by the other gentlemen on the panel.

There is some confusion in my mind. Now, I am an entrepreneur. I started MicroAge with my partner in 1976, like Mr. Zimmerman started his business 30 years ago, on hip pocket capital with a credit card and $30,000, built it to a large business within a rapidly growing industry, had to take it through a chapter 11 as a result of the back-to-back recessions in 1980–1981, took it out in 10 months, grew it from a $5 million business to a quarter-of-a-billion-dollar business in 1987 and, as a result, have been ranked as the 36th fastest growing company in the United States by Inc. Magazine in 1988. So I know what it is like to ride a wild industry and to grow, and to grow in an industry that today represents over $50 billion in sales.

Now, unlike a statement made, I think, by Senator Rudman, and with all due respect, where he mentioned that 99 percent of products sold don't require service—I disagree with that. Our industry is certainly that 1 percent, and I disagree with that; we are larger than 1 percent.

And there are many other industries that deal with capital goods that are sold to businesses through resellers rather than being sold by direct manufacturers. That is a very healthy trend in our industry and it really has taken hold in my side of the business where service is definitely required.

There are four things that really confuse me. I read through the bill and tried to understand how this applied to me as a business person, and I certainly sympathize with Senator Kohl's perspective.

First of all, I thought this was a question about causation versus agreement, and this bill basically is defining causation as the reason for liability under antitrust, not agreement, which has previously been discussed, or currently is the situation.

It talks about pricing policies as a reason to convict and find guilty rather than a conspiracy to agree to fix prices, and I think that is substantially different. I believe it fundamentally confuses the concept of market competitiveness with competition with a manufacturer's product.

For example, a lot was talked about not being able to buy a Sharp product in Houston because the price was too high. Frankly, I really could give a darn. Why don't we go ahead and buy Texas Instruments products because they are cheaper? I mean, there are other products you can buy other than Sharp. So I think there is a confusion there between competitiveness in the market between brands and what a particular manufacturer does with respect to dealer organizations in order to optimize sale of the product.

Finally, I think the question that really is confusing at the very end of the bill where it talks about the rule of reason applying to territory and location clauses—I guess it specifically excludes other nonprice-related reasons, which I guess would lead me, if I was on a jury, to believe that they would not fall under rule of reason.

But when you look at that, you start looking at Senator Kohl's example about the clock dealer and you say, well, you know, there are some real questions there as to who is going to get hurt.

Let us change this a little bit. We know the clock dealer is big enough to have lots of lawyers, so they can understand how to relate and say things in the right way. They could even say, well, what I really need is a protected territory.

Well, let us switch the tables. Let us say it is a large discounter, and in our industry large discounters now are having to add services to what they do because of competition from small service-oriented dealers.

Well, let us say a large discounter says, well, I need territorial protection to justify my large investment in stores and advertising, so I want territorial protection for the State of New York or the State of North Carolina, and they are a discounter. What happens to the service-oriented dealers? I mean, this can switch and turn, so I think it is a real challenge here. Basically, what it boils down to is the small business that can't afford legal counsel, can't present this properly, will, in effect, not be able to comply.

I think it all boils down to really four issues in my mind. First, this increases spurious litigation and, in turn, will increase the cost of business and ultimately affect prices people can charge. I think the threat of litigation will harm smaller businesses more than larger businesses, will render nonprice restraints such as servicing requirements in contracts useless, because who would comply with that if no one will comply?

Two, it chills and stops legitimate communication between manufacturers and dealers. In our industry where there is lots of change, communication is everything. It restricts the free flow of market information because of the threat of litigation. It also limits self-policing, which is important, which is really at the heart of ABCD.

Three, it reduces product service and value options to clients. I mean, not only should they have choice by casting their dollars to vote, but they should have an option to choose from a wide range of service opportunities and service providers. It is not black and white; it is a range in our industry, and what I hear here is basically forcing everyone to move to a discount approach.

And, finally, I think it would substantially increase the likelihood that legitimate conduct will be found illegal and penalize those who are attempting to effectively service the market properly.

Senator **Metzenbaum**. Thank you very much, Mr. Hald.

[The statement of Mr. Hald follows:]

abcd

The Microcomputer
Industry Association

Statement of Alan P. Hald

Chairman

ABCD: The Microcomputer Industry Association

on S. 865, The "Consumer Protection Against Price-Fixing Act of 1989"

Before the

Committee on the Judiciary

United States Senate

Washington, D.C.

June 1, 1989

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Statement of Alan P. Hald, Chairman
ABCD: The Microcomputer Industry Association
On S. 865, The "Consumer Protection Against Price-Fixing Act of 1989"

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Mr. Chairman and Members of the Committee:

I very much appreciate the opportunity to appear before the Committee to discuss S. 865, the "Consumer Protection Against Price-Fixing Act of 1989". Today marks the first time that ABCD: The Microcomputer Industry Association has appeared before Congress to take a position on pending legislation. ABCD strongly opposes S. 865 and would urge the Committee to carefully consider the harmful ramifications the legislation would have at all levels of the distribution chain - manufacturers, dealers and, ultimately, consumers.

Mr. Chairman, I am here today to represent the viewpoint of the small independent businessman and the larger organizations, both of whom are sellers of complex consumer products. I am a businessman, not a lawyer; I do not claim to know all the ins and outs of antitrust law. However, as an entrepreneur who has built a successful business in the personal computer industry over the last 13 years, I do know something about operating a business and I am certain that S. 865 will harm business and consumers in ways I do not think was anticipated or intended by the sponsors of this legislation.

Our ABCD manufacturer and dealer members produce and sell a wide array of sophisticated computer products, ranging from desktop computers and wordprocessing software to state of the art technical workstations and local area networks running accounting applications. New products come on the market constantly, offering consumers what can be an often confusing array of options that must be put together into a compatible system.

It is precisely because of the complexity of the products and systems we sell and the consequent need to make them all work together for the consumer that ABCD was founded in 1983. Simply stated, the goal of ABCD is to make certain that consumers who buy microcomputer products know what they are buying, that what they buy will meet their needs and, if anything goes wrong, that both the dealer and the manufacturer stand behind their products. Our member dealers are committed to giving each customer help both before and after the sale, so that the system they purchase is right for them. We know that long term customer satisfaction requires high standards of professionalism. Our manufacturer members strive to support, train and assist their dealers so they are capable of fulfilling their obligations to the consuming public. In short, in our industry the manufacturer/dealer relationship is best described as a working partnership which, when successful, is focused on consumer satisfaction.

Mr. Chairman, ABCD requires each of its members to sign and agree to abide by a Code of Ethics committing each member to high standards of customer service and satisfaction. Thus, to become an ABCD member, dealers and manufacturers must agree, among other things, to provide:

- On-site and/or carry-in service, replacement parts, and trained service technicians, and/or a comparable maintenance program through a third-party service organization,
- Pre-delivery inspection and testing of computer equipment,
- A policy that ensures each customer is sold an appropriate product for his or her needs and informs customers of the limitations of services or capabilities related to products being sold,
- Strict adherence to all provisions of vendor authorization programs,
- Start-up training and basic product training and/or third-party training to all customers in need of such

services, and

- Marketing communications which represent accurate descriptions and claims regarding products, prices, and services.

A complete copy of ABCD's Code of Ethics is attached to my testimony as Exhibit A.

We also endeavor to specifically educate consumers as to what they should expect from a computer dealer. An ABCD consumer brochure which many of our members have available in their stores advises consumers of what to look for in a dealer. The consumer is advised, among other things, to make sure the dealer will:

- Thoroughly analyze customer needs,
- Describe service, technical support, and training programs prior to completion of the sale,
- Publish product-return policies, and
- Describe product warranties.

A complete copy of the ABCD consumer brochure is attached to my testimony as Exhibit B.

Mr. Chairman, a large portion of our industry has embraced the ABCD business philosophy. ABCD has grown dramatically over the past six years. Its membership includes approximately 300 dealer headquarters representing almost 900 locations. Recognizing the ABCD commitment to quality and customer satisfaction, 80 manufacturers, including such well known companies as IBM, Apple, Compaq and Hewlett Packard have joined ABCD as vendor members. (A complete list of our members is attached to my testimony as Exhibit C). ABCD constantly strives to find new and better ways for its members to service customers with enthusiasm, dedication and, above all, integrity. Everyone wins when consumers can buy a wide range of quality products and services at the best possible prices. In a nutshell, that is the ABCD way of doing business.

Unfortunately, Mr. Chairman, S. 865 threatens to severely curtail, if not completely eliminate, our ability to provide a wide range of quality products and services. The specter of treble damage antitrust litigation and liability for activities which have not been held in violation of antitrust law, which S. 865 creates, would have a chilling effect on the manufacturer/dealer relationship. In the end, consumers will suffer a substantial loss of choice and possible higher prices.

At the outset of my criticism of S. 865, let me state that I do not think the sponsors of this legislation intended to affect our industry in such a dramatic manner. I would hope that, as consumer advocates, the sponsors of S. 865 would applaud ABCD's efforts to ensure the ethical treatment of consumers and consumer satisfaction. In its effort to protect consumers from price-fixing, however, the broad scope of S.865 threatens to eliminate consumer protection against a whole host of equally detrimental practices, all of which ABCD is dedicated to preventing. While the preamble to S.865 specifically recognizes "the needs of manufacturers and others to maintain reasonable service, quality and safety standards," ABCD submits that the broad scope and ambiguity of the legislation will have just the opposite effect. Please allow me to discuss several of our major objections to S. 865.

Mr. Chairman, if enacted, the standard of evidence contained in new Section 8(a) of the Sherman Act created by S. 865 would have severe practical consequences. Simply put, Section 8(a) would put our members in an impossible position. Because the legislation creates the overwhelming possibility that legitimate, pro-consumer, business activity will be branded as action indicative of illegal price-fixing, many practices beneficial to the consumer may cease. Both manufacturers and dealers who desire to ensure that products are sold under terms and conditions designed to benefit the consumer may nevertheless find themselves as co-defendants in an unwarranted antitrust price-fixing case brought by a terminated dealer.

In its desire to reverse the Supreme Court's 1984 Monsanto[1] decision, S.865 does so in the broadest possible terms. To get his or her price-fixing claim to the jury, a terminated dealer need only show that (1) a competing dealer made an "express or implied request or demand, including a threat to discontinue any existing business arrangement" to the manufacturer to "eliminate price competition" by the terminated dealer, and (2) that this express or implied request or demand was "the major contributing cause" of the termination.

Mr. Chairman, under this standard, I do not see how to prevent virtually any communication between a dealer and a manufacturer from becoming the basis of a price-fixing case. What constitutes an "implied ... request or demand ... to curtail or eliminate price competition ... ?" Dealers communicate with their manufacturers all the time. Without such communication manufacturers would find themselves in the dark about the marketplace and unable to respond to changing conditions.

Undoubtedly, dealers communicate with manufacturers about each other. One dealer who complies with a manufacturer's service requirement may well report his or her suspicion that another dealer is not complying. In so doing, is that an "implied" request to terminate the non-complying dealer? S. 865 seems to suggest that it is. Does this "communication," standing alone, suggest that a price-fixing conspiracy has occurred? Absolutely not. In fact, this self-policing activity benefits the consumer by quickly identifying dealers who may not be living up to their contractual commitments for product service.

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[1] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)

The requirement that such "express or implied request" must be "the major contributing cause" of a termination gives little comfort. Information about one dealer received from another dealer may in fact cause a manufacturer to investigate and then make a unilateral decision to terminate. That is, of course, a far cry from an antitrust conspiracy. Without some additional evidence that an unlawful agreement occurred, such a case should not be submitted to a jury.

In 1984, the Monsanto decision held that termination of a dealer "following or in response to" such dealer's complaint was not in itself sufficient to send a price-fixing case to the jury. The Court recognized that since a termination under those circumstances could well be for legitimate, lawful reasons, a terminated dealer had to produce some additional evidence of conspiracy to get to the jury. As a layman, that seems to me to be a logical, rational rule that serves both to punish price-fixers, while also protecting the legitimate flow of information important to the self-regulation of an open market system.

By effectively reversing Monsanto, S. 865 would inhibit a broad range of pro-consumer activity which, under this standard of evidence, could be challenged as price-fixing activity. At the very least, manufacturer dealer communications will be severely chilled. No one wants any remark or comment to later be construed by an antitrust court as an "express or implied" request or demand to terminate another dealer. Thus, we are fearful that were S. 865 to become law, communications between manufacturers and dealers regarding current market conditions would come to a virtual standstill. Regardless of whether a competitor is providing poor service, bad advice, deceptively advertising or otherwise not meeting a manufacturer's requirements, any comment or complaint could become sufficient evidence on which to send a completely unfounded antitrust case to the jury.

I would hasten to add that the fact that S. 865 would prohibit a jury from making "implausible inferences" to find that price-fixing has occurred is also of little comfort. As long as a termination was preceded by competitor complaints, the very provisions of S. 865 dictate that an inference of

price-fixing is plausible, and thus appropriate for jury consideration. I fail to understand how this prevents any case meeting the standard of evidence of S. 865 from going to the jury.

Mr. Chairman, ABCD also fears that the attempt of S. 865 to overturn the Sharp[2] decision will have an equally chilling effect on manufacturer/dealer relations. Under this new determination of what constitutes an automatic violation of the antitrust laws, it is extremely likely that perfectly legitimate, lawful behavior could be mistakenly condemned as price-fixing. Once again, discussion between manufacturers and retailers having nothing to do with price-fixing and everything to do with customer service could serve as the basis for antitrust liability.

Finally, Mr. Chairman, I would also note our genuine puzzlement over Section 5 of S. 865. Section 5 provides that the legislation does not affect application of the rule of reason to vertical location clauses or vertical territorial restraints. My understanding is that merely restates existing law. Our worry, however, is over the status under the antitrust laws of other non-price vertical restraints if this section were to become law. Given the fact that all non-price restraints are subject to the rule of reason, why does Section 5 apply to only two? It would seem likely that a court could quite reasonably interpret Section 5 to mean that all other vertical restraints except those two mentioned are to be considered as automatically unlawful rather than judged by the rule of reason. Again, I would only hope that the sponsors did not intend that result.

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[2] Business Electronics Corporation v. Sharp Electronics Corporation, 108 S. Ct. 1515 (1988)

Mr. Chairman, I would conclude this brief overview of our objections to this legislation by reiterating that whatever its intent, S. 865 would damage the entire chain of distribution. In the final analysis, consumers would suffer if it is enacted. ABCD was created on the belief that our industry will continue to grow and prosper only as long as consumers remain satisfied. In our industry especially, consumer satisfaction depends on consumers purchasing compatible products with accurate expectations of performance and availability of training and service.

For the reasons outlined above, the specter of unjustified antitrust liability created by S. 865 can only serve to chill our ability to serve our customers. In reversing Monsanto, everyday communications about the marketplace, essential to maintaining a competitive open market, no matter how innocent, stand to be transformed into price-fixing cases sufficient to be presented to a jury. In reversing Sharp, agreements between manufacturers and dealers having nothing to do with price-fixing stand to be condemned as automatically unlawful. The "safeguards" in S. 865 to prevent such unjust results are illusory.

On behalf of ABCD, I urge the Committee not to approve S. 865. Thank you for your consideration.

MicroAge

September 15, 1989

Howard M. Metzenbaum, Chairman
Subcommittee on Antitrust
Senate Judiciary Committee
Washington, D.C. 20510

c/o Laura H. Putman
Antitrust Subcommittee

Dear Senator Metzenbaum:

The following represents my responses to Senator DeConcini's questions on my testimony relative to amending the Sherman Act S.865.

1. Mr. Hald, you expressed concerns that everyday communications between a distributor and a manufacturer about the marketplace may expose the manufacturer to allegations of price-fixing and thus treble damages if S.865 is adopted. If indeed the communications are "everyday", isn't it likely that the judge would deem any inference of illegal collusion "implausible" and grant summary judgment? Or that, if the case goes to a jury, the jury would not find the communication an "agreement" or a "major contributing cause" of a later termination?

A: Senator, under S.865 a judge could not deem an inference of illegal collusion "implausible" if, in fact, a plaintiff is able to meet the standard of evidence set forth in the legislation. As long as a communication could be characterized as either an "express or implied request or demand" to terminate a dealer, an inference of collusion is, in fact, mandatory rather than just plausible. As I testified at the hearing, that standard is so broad and vague that it will undoubtedly turn normal, everyday business communication into sufficient evidence of a price-fixing conspiracy to get to a jury. It does not require particularly creative thinking to fashion an argument that any communication to a manufacturer by a dealer about another dealer is actually an "implied" request to terminate that dealer. As currently written, the standard of evidence for S.865 is indifferent to the frequency of any particular communication with respect to whether such communication would constitute an "implied" request to terminate another dealer. Unfortunately, the more frequent any communication occurs will simply translate into a greater possibility that baseless lawsuits will be filed.

If a case went to a jury based on a frequent communication, I would, of course, be hopeful that a jury would balance the facts carefully and conclude that no agreement was present. However, the very fact that a judge was required to send such a case to the jury because of "everyday" communication was the "major contributing cause" of a termination means that the jury would still be free to find that a conspiracy occurred without any real evidence of agreement. Thus, in essence, S.865 would operate to assume or infer guilt and then require defendants to prove themselves innocent. That is exactly the opposite of my layman's understanding of how our system of justice is supposed to operate.

2. You represent ABCD which has a Code of Ethics. Do you think that having a written code of ethics might help to insulate a manufacturer against a Sherman antitrust judgment if 865 is adopted? It seems a manufacturer might more easily provide that a distributor termination, even one that follows a competitor's complaint, was predicated on a breach of a written code of ethics rather than on an effort to illegally set prices if such a code is in place. If this is the case, manufacturers might follow your example and adopt codes of ethics and in so doing balance what you perceive to be the pro-discount distributor approach of 865.

A: Unfortunately, Senator, rather than serve as a model to other groups, I believe that if S.865 passes, it may well sound the death knell for ABCD's various Codes of Ethics. Our Codes were created for one purpose: customer satisfaction. As such, they do impose certain requirements and responsibilities on all ABCD members, including both manufacturers and dealers. However, if S.865 becomes law, the ABCD Codes of Ethics could become a lightening rod for frivolous antitrust suits, rather than serving its intended purpose of consumer satisfaction. I am personally fearful that any attempt of ABCD to enforce its Codes of Ethics, or even any of its members complaining about ABCD or non-ABCD members, could have serious implications under S.865. Specifically, it would not be surprising for a terminated dealer to assert that a complaint regarding a supposed violation of the ABCD Codes of Ethics to a manufacturer was in fact an "implied request" to terminate the dealer.

Please feel free to contact me should you have additional questions.

Sincerely,

MICROAGE, INC.

Alan P. Hald
Chairman

APH:ch

Senator **Metzenbaum**. Mr. Sims, we are happy to see you, sir. It is nice to have you with us again.

STATEMENT OF JOE SIMS, OF JONES, DAY, REAVIS AND POGUE, WASHINGTON, DC, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. **Sims**. Thank you, Mr. Chairman. I want to thank you for your courtesy in allowing me once again to present the views of the American Bar Association on S. 865. As you will recall, I appeared before this committee last year on behalf of the ABA opposing S. 430, and for many of the same reasons the ABA continues to oppose S. 865.

I would be remiss, however, if I did not fail to recognize the efforts of you, Mr. Chairman, and the other sponsors of this legislation to respond to some of the concerns raised by the ABA and others last year. Obviously, some changes have been made in response to those concerns.

Unfortunately, from our perspective, these changes do not alter the basic premise of the legislation, nor successfully treat with the problems that we saw, and so we continue to oppose the bill.

We really have two points to make, and I will try to summarize those briefly. First, we think S. 865 is unnecessary. We ought to be clear at the beginning that notwithstanding all of the talk both before this committee and other places about vertical price-fixing, this is not a vertical price-fixing bill. It does not change the law on vertical price-fixing. The only effect it has on vertical price-fixing law is to codify the existing judicially-created rule.

What it does do, however, is dramatically expand the definition of vertical price-fixing to include many circumstances in which there is no agreement on price and, indeed, many circumstances in which there probably is no agreement of any kind.

S. 865 is advanced as necessary to clarify *Monsanto* and overrule *Sharp*. Neither is required. Contrary to the assertions of some, the *Monsanto* decision has not generated confusion, and indeed simply reiterated a traditional evidentiary rule in antitrust.

We believe that S. 865 would more likely create confusion as opposed to reduce it, for the reasons that I have outlined in my testimony. As Senator Kohl pointed out in his questioning of Dean Pitofsky, there are many circumstances under this legislation which are going to result in a jury verdict based on a mental flip of the coin, if you will, as to whether this was a price-fixing agreement or some other kind of agreement which had a similar effect on price.

That is a highly undesirable result. The result will be increased litigation, increased costs. And while we are quite confident that the sponsors of the legislation do not intend this, it will not likely increase consumer choice, but decrease it.

The second concern that the American Bar Association is that S. 865 will have unexpected and unintended consequences which are highly undesirable. The debate here is really a debate about means, not ends. There is no disagreement on the legal standard that ought to be applied, and there is no disagreement about the ultimate objective, which is to benefit, not injure, consumers.

Our concerns are based on our conclusion that the adverse consequences of this legislation to consumers will outweigh any potential consumer benefits, and these consequences are no less real because they are unintended.

We are concerned about the codification of the per se rule, for the reasons outlined in my testimony and, indeed, for some of the reasons pointed out by Mr. Pitofsky in his testimony.

This is a particular problem, we think, in an area where there is considerable flux, and has been considerable flux over the years, and where there is considerable, well-founded, good-faith, intellectual disagreement about the pros and cons to consumers of particular kinds of vertical restraints. To codify an existing judicially-created rule of law in those circumstances seems to us to be unwise.

It is important to realize that plaintiffs who fail to convince a court that their claim should be submitted to a jury as a per se violation are not thrown out of court. Instead, under *Sylvania*, they simply have to show that the alleged restraint had some anti-competitive effect in order to establish liability.

Plaintiffs who demonstrate a per se violation by meeting this burden win our confidence because we know that, by definition, there must be an anti-competitive effect. The simple fact, Mr. Chairman, is that the only plaintiffs who need this legislation are those who cannot show that there was a vertical price-fixing agreement, in fact, or those who cannot show that whatever conduct did take place had any significant anti-competitive effect.

This is not a category of plaintiffs who should be thought entitled to special relief. After all, the antitrust laws were designed to protect competition, not individual competitors. If a terminated dealer cannot show that his termination will have an adverse effect on competition or cannot show that he was, in fact, the victim of a per se illegal price-fixing agreement, he does not today and should not tomorrow have an antitrust claim.

This legislation would turn disputes between dealers and suppliers that in the vast majority of cases have no competitive significance into statutorily codified per se violations of the antitrust laws.

It will create a risk of confusion and ambiguity where none exists. It will raise the risk of frivolous or unfounded litigation, and it may well discourage the use of efficient distribution networks. For all these reasons, the American Bar Association respectfully opposes enactment of S. 865.

Thank you.

Senator METZENBAUM. Thank you, Mr. Sims.

[The statement of Mr. Sims follows:]

TESTIMONY OF JOE SIMS

ON BEHALF OF THE AMERICAN BAR ASSOCIATION

ON S. 865, THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989

Before the Committee on the Judiciary
United States Senate

June 1, 1989

I appreciate the opportunity to present the views of the American Bar Association ("ABA") on S. 865, the Consumer Protection Against Price-Fixing Act of 1989. As you will recall, I appeared before this Committee in the last Congress, testifying on behalf of the ABA concerning S. 430, the predecessor to S. 865. On that occasion, I explained the ABA's opposition to S. 430. For many of those same reasons, the ABA now opposes S. 865.

We would be remiss, however, if we failed to recognize the efforts of the sponsors of S. 865 to respond to some of the concerns raised in our testimony last year. Obviously, certain changes have been made in response to these concerns, and for the most part they are desirable changes. Unfortunately, these changes do not alter the basic premise of the legislation, nor do they successfully treat the serious adverse effects that the legislation would likely have on antitrust jurisprudence and distribution decisions. Both the basic premise and the likely impact of S. 865 continue to be of great concern. Therefore, the ABA opposes enactment of S. 865 for the reasons described below.

1. S. 865 is unnecessary legislation.

First, we should be clear that this is not a vertical price-fixing bill. Vertical price-fixing is already per se illegal, and has been since 1911.1/ This bill would not change that rule, except that it would engrave it in stone by codifying the current rule of per se illegality (except for maximum price-fixing). This codification presents its own problems, which are addressed below, but at least in that respect the bill creates no new substantive rule of law.

What S. 865 would do, unfortunately, is dramatically broaden the definition of vertical price-fixing to include many circumstances in which there is no agreement on price, and indeed circumstances in which there was probably no agreement of any kind. S. 865 is not needed to make true instances of vertical price-fixing subject to attack and trial on the merits, for the existing law already reaches such conduct. Instead, S. 865 requires that, in some ambiguous but potentially very broad sets of circumstances, conduct which can arguably be characterized as having some effect on price must be treated as if it were a vertical price-fixing agreement.

S. 865 is advanced as necessary to "clarify" Monsanto2/ and

1/ Dr. Miles Medical Co. v. John W. Park & Sons Co., 220 U.S. 373 (1911).

2/ Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

overrule Sharp.3/ Neither is required. Contrary to the assertions of some, the Monsanto decision has not generated confusion in the lower courts. The Monsanto standard is the traditional evidentiary rule in antitrust. It is at least as old as the Theatre Enterprises decision in 1954.4/

Traditional antitrust doctrine has always required either direct proof of a conspiracy or, failing that, a showing that conspiracy is a more likely inference to be drawn from the challenged conduct than is independent action. Evidence equally consistent with innocence and guilt will not, without more, support a jury finding of liability. This standard is rooted in fairness: it would be grossly unfair to a defendant to allow a jury faced with two equally plausible explanations of its behavior, one legal and the other illegal, to flip a mental coin. Therefore, showing that conspiracy is a possible explanation of a defendant's conduct is not enough; there must be something more for the jury to go on. Otherwise, defendants could be placed at risk by those unscrupulous enough to file harrassment suits with the hope that a jury might make a favorable guess about the meaning of the defendant's conduct.

3/ Business Electronics Corp. v. Sharp Electronics Corp., 108 S.Ct. 1515 (1988).

4/ Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

There is no evidence that lower courts are confused or are misapplying the current legal standard. Different facts before different courts inevitably produce different results, and not every district court or even court of appeals decision is inevitably correct. But this is a general state of affairs in every area of law and is not itself a sufficient basis for Congressional action. The Supreme Court is better suited and has the power to correct any decisional trends it perceives as incorrect or at variance with its prior opinions -- as it has in fact done in Monsanto and Sharp.

The passage of S. 865 would likely create confusion, not reduce it. Section 8(a)(1)(A) would require submission to the jury as a possible vertical price-fixing agreement any situation in which there was "circumstantial" evidence of an agreement to "curtail or eliminate" price competition. According to Section 8(a)(1)(B), such "circumstantial" evidence would be sufficient if it was based on an "implied request or demand" from a competitor of the claimant that the seller "take steps to curtail or eliminate price competition by the claimant," and that that request or demand was "the major contributing cause" of a subsequent termination or refusal to supply.

Under this standard, what would be the result if a dealer communicated with a manufacturer suggesting that the dealer become the manufacturer's exclusive distributor in a certain area, and offering to undertake various marketing and servicing responsibilities in return for the exclusive right to sell the product? If the manufacturer agreed and terminated all other dealers in the area, would this be "circumstantial" evidence of an agreement to "curtail or eliminate" price competition? It certainly was initiated and, thus, arguably was caused in some sense by a request from a competitor of the terminated dealers. Furthermore, it could certainly be argued that the request was "the major contributing cause" of the termination.

On these facts, would S. 865 require this case to go to the jury on a per se vertical price-fixing theory, thus enabling the jury to find liability, and impose treble damages, without any showing of an effect on competition? If so, S. 865 has not only repealed Monsanto and Sharp, but Sylvania[5] as well, and with disastrous consequences. Obviously, the sponsors recognized this problem, and included Section 5 in the bill, which purports to protect "vertical location clauses or vertical territorial restraints" from the application of this new per se rule. But how is a court to reconcile a "circumstantial" evidence standard in a bill explicitly designed to overrule Monsanto and Sharp with this ambiguous precatory language? And why is this language thought broad enough to protect Sylvania, which covers all non-price vertical restraints?

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[5] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

In addition, there is Section 4, which purports to reaffirm the requirement that a violation of Section 1 of the Sherman Act be based on the finding of an agreement. This is a bizarre provision, restating what is already the explicit standard in a 100 year-old statute. But it is thought necessary, apparently, because the main provisions of S. 865 direct the courts to do just the opposite -- to find a vertical price-fixing agreement, even if it doesn't exist, as long as certain other circumstances are present. If this section in fact preserves the Colgate doctrine[6] -- that unilateral decisions by a supplier are not subject to antitrust attack -- then it must nullify the basic substantive provisions of S. 865. Obviously, this is not the sponsors' intent, and thus the only logical inference to be drawn from the presence of Section 4 is that it is intended as mere window-dressing, with no substantive effect. Neither of these "protections" in fact protects the American economy from the likely adverse effects of the basic substantive provisions of S. 865 described below.

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[6] United States v. Colgate & Co., 250 U.S. 300 (1919).

2. S. 865 would have highly undesirable consequences.

The concerns raised by S. 865 are the product of a debate about means, not ends. Obviously, the sponsors of this legislation want to benefit, not injure, consumers. Similarly, the ABA's concerns are based upon its conclusion that the adverse consequences of this legislation *to consumers* outweigh any potential consumer benefits. These consequences are no less real because they may be unintended.

Initially, the ABA is concerned about the codification of the current *per se* rule on vertical price-fixing. As you will recall, various forms of resale price maintenance have, from time to time, been thought desirable by Congress and other bodies. In addition, non-price vertical restraints were considered *per se* illegal for a ten-year period following the *Schwinn* decision.[7/] The analysis of vertical restraints is complicated, as demonstrated even by S. 865's exclusion of *maximum* vertical price-fixing from its codification of the *per se* rule. This complicated area does not deserve the simplistic treatment contemplated in S. 865.

Of course, as a general proposition, the codification of *per se* rules is unwise. The antitrust laws were intended to be broad, flexible mandates, providing courts with the ability to respond to a range of evolving conduct. This flexibility has

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[7/] United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

been critical in enabling laws passed a century ago to evolve in response to new developments in our understanding of how markets work. While this process does not always move in a unified direction, codifying any per se standard would impair the statute's ability to adapt to changing economic conditions.

What would the antitrust laws be like today if the per se rules of the 1950's and 1960's had been engraved in statutory stone? Instead of modification by litigation over time, we would no doubt be engaged in just this kind of legislative struggle, but on regular basis. Such struggle would not be likely to produce the kind of gradual, measured change we have seen over the first century of antitrust law. Incremental change simply is not the usual product of the legislative process.

This concern has special force in the area of vertical price restraints, which continues to be the subject of considerable debate among scholars, practitioners, and policy makers. S. 865 would freeze the current state of the law, creating a statutory rule that could only be changed by statute, and withdrawing from the federal courts the flexibility that has proven so desirable in dealing with other complex concepts. This is unwise and undesirable as a general proposition, and particularly so in an area where there is continuing intellectual ferment.

In addition, as noted earlier, this legislation will create confusion and promote frivolous litigation, rather than solve any noticeable problem that exists today. Any antitrust practitioner can explain the dramatic difference between the antitrust terrorism of the 1960's and early 1970's, when dealer termination cases were the meat and potatoes of most antitrust practices, and today, when those dealer termination cases that are brought survive only when there is a real competitive problem at the heart of the litigation. Despite claims to the contrary, this improvement has not been caused by a change in the enforcement patterns of federal agencies. These agencies were never the major source of vertical restraint cases. Rather, the change has resulted from the general trend in antitrust to require more proof and less rhetoric, to base liability more on facts than on theories, and to abandon presumptions of anticompetitive effect that have been proven baseless.

It was inevitable that this general trend would have a significant impact on vertical restraint cases, and it did, starting with _Sylvania_. There, the Supreme Court threw out the _per se_ rule, and adopted a rule of reason analysis for all non-price restraints. Many believe that vertical price restraints similarly should have been included under the rule of reason, since the same benefits and burdens can flow from both price and non-price restraints. Certainly, as the Supreme

Court recognized in Sharp, non-price restraints like territorial exclusivity can affect price in ways indistinguishable from the effects produced by direct price restraints.[8]

Whatever the merits of that argument, price and non-price restraints have been treated differently. But the courts, and especially the Supreme Court in Monsanto and Sharp, have been very careful to ensure that non-price restraints not be falsely characterized as price restraints, and thus denied the rule of reason analysis they are entitled to under Sylvania. Of course, this line is hard to draw precisely, since it is undeniable that both price and non-price restraints can both have an effect on price, and not everyone will agree with every line drawn. But the methodological approach, given the premise, is sound and indeed is the only conceivable way to maintain this legal distinction and preserve Sylvania. In many respects, S. 865 would arbitrarily draw an artificial line that would be impossible to change except by new legislation. Even if the line was arguably correctly placed -- which we believe it is not -- the process is unwise.

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[8] Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515, 1521-22 (1988)("[A]ll vertical restraints, including the exclusive territory agreement held not to be per se illegal in GTE Sylvania, have the potential to allow dealers to increase 'prices' . . .").

Reasonable minds may, of course, differ on where best to draw that line.[9] However, for all the reasons described in *Sharp*, there is a real cost attached to drawing the line anywhere but where the Supreme Court has drawn it. *Any* vertical restraint can be argued to have an effect on price; if that were all that was required to show a violation of the Sherman Act, *Sylvania* clearly would disappear. S. 865 tries to find another formulation: "curtail or eliminate price competition." Unfortunately, this formulation suffers from the same weakness, which is exacerbated by S. 865's requirement that any communication that causes a termination is "sufficient evidence" of an agreement to curtail or eliminate price competition.

The net result of such a standard is to make it practically impossible to defeat a competently pled and litigated dealer termination case short of a jury verdict. That would likely mean a return to the extremely costly system of antitrust litigation as a regular and normal part of every dealer termination. Ultimately, the result is greater hesitancy by suppliers to make distribution changes solely because of the costs of antitrust litigation. This retrogression would be sad, and ultimately costly to consumer.

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[9] *Compare* Easterbrook, "Vertical Arrangements and the Rule of Reason," 53 *Antitrust L. J.* 135 (1984) *with* Pitofsky, "In Defense of Discounters: The No Frills Case For a *Per Se* Rule Against Vertical Price Fixing," 71 *Geo. L. J.* 1487 (1983).

The only real beneficiary in this process is the antitrust bar. Antitrust litigation and counseling will increase, and the decline in private suits we have seen over the past 15 years will be reversed. But consumers will not see any more discounting than they see today, nor will they see more or better products. Instead, the most likely results are less efficient distribution systems, higher costs, and ultimately higher priced products for consumers.

This problem is not solved by Section 5's "exemption," if that is what it is, of vertical location clauses or vertical territorial restraints from S. 865's overly broad reach. The mere fact that such an exemption was thought necessary speaks volumes about the likely consequences of S. 865 if enacted. What about other non-price restraints? Because they are not specifically exempted, are they subject to being caught in S. 865's artificial "this-is-a-price-restraint-because-I-say-it-is" web? And by what criteria are some non-price restraints included in the exemption, while others are not?

The plain fact is that *Sharp* cannot be overruled without threatening *Sylvania*, because *Sharp* does nothing more than reiterate *Sylvania*'s holding: An agreement on price, which is *per se* illegal with any proof of actual competitive effect, must consist of (1) an agreement (2) on price. If either ingredient is missing, either *Sylvania* applies or Section 1 of the Sherman Act is wholly inapplicable. S. 865 overrules *Sharp* by legislating that, under certain very ambiguous circumstances, the per se prohibition against vertical price-fixing agreements will include conduct that may not involve an agreement or agreements that are not agreements on price. This is simply incompatible with Sylvania, and the band-aid offered in Section 5 will not bind up the wound.

Conclusion

It is important to realize that plaintiffs who fail to convince a court that their claim should be submitted to a jury as a per se violation are not thereby thrown out of court. Instead, under Sylvania, they simply have to show that the alleged restraint had some anticompetitive effect in order to establish liability. Plaintiffs who demonstrate a per se violation by meeting this burden win our confidence, because we know that, by definition, there must be an anticompetitive effect. The simple fact is that the only plaintiffs who need this legislation are those who cannot show that the conduct of which they complain was in fact a vertical price-fixing arrangement or actually had any significant anticompetitive effect. This is not a category of plaintiffs who should be thought entitled to special relief. After all, the antitrust laws were designed to protect competition, not competitors. If a terminated dealer cannot show that his termination will have an adverse effect on competition, or cannot show that he was the victim of a *per se* violation, he does not today, and should not tomorrow, have an antitrust claim.

This legislation would turn disputes between dealers and suppliers -- disputes that in the vast majority of cases do not have any competitive significance -- into statutorily codified *per se* violations of the antitrust laws. This result would come about despite the fact that it is inconsistent with the historical strength and tradition of antitrust law; despite its logical inconsistencies; despite the fact that discounting is thriving today under existing standards; and despite the fact that the legislation would likely have severe anticompetitive effects, including the undermining of what every antitrust observer recognizes was a critically important step in antitrust's maturation, the *Sylvania* decision. Under these circumstances, legislation such as S. 865 is inappropriate.

Furthermore, S. 865, if adopted, will create a significant risk of creating confusion and ambiguity where none exists; it will raise the risk of frivolous or unfounded litigation; and it may discourage the use of efficient distribution networks. For all these reasons, the American Bar Association strongly opposes enactment of S. 865.

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August 29, 1989

VIA HAND DELIVERY

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
  Monopolies and Business Rights
Senate Committee on the Judiciary
Dirksen Senate Office Building
Washbington, D.C. 20510-6275

Attention: Ms. Laura Putnam

Dear Mr. Chairman:

Re: Senator DeConcini's Question on S. 865

I want to apologize for the delay in responding to Senator DeConcini's question regarding the standard for summary judgment in connection with S. 865, the Consumer Protection Against Price-Fixing Act of 1989.

Senator DeConcini asked the following question: Section 8(a)(2) allows a judge to grant summary judgment and deny the plaintiff access to a jury trial when it is implausible to infer that a conspiracy of vertical price fixing exists. Isn't this the usual standard in reviewing summary judgment motions? If the evidence can possibly support a judgment for plaintiff, shouldn't the judge deny summary judgment and allow the case to go to the jury?

Section 3 of S. 865 would add a new Section 8(a)(2) to the Sherman Act to provide that a court may determine whether an inference of vertical price fixing is plausible before allowing a jury to decide the issue. This is not the "usual standard" in reviewing summary judgment motions. The operative provision of Fed. R. Civ. P. 56(c) governing the grant or denial of summary judgment depends on the existence of a genuine issue as to any material fact. This provision of S. 865 would permit a jury to infer the existence of a vertical price fixing conspiracy without requiring a plaintiff to produce any evidence of a conspiracy. Thus, in this respect, S. 865 is not consistent with the Federal Rules regarding summary judgment.

Juries decide material issues of disputed fact from which inferences may be drawn. Pursuant to Fed. R. Civ. P. 56(c), the court must allow the jury to decide material issues of disputed fact. The court is not permitted to decide which theories are possible or which inferences are plausible. If there are no facts to support a theory or an inference championed by the plaintiff, summary judgment for the defendant is appropriate. Without some evidence of an agreement to fix prices, a jury cannot infer an illegal conspiracy on the basis that the parties met or that a competitor voiced a complaint to the manufacturer or that the plaintiff was subsequently terminated. These facts, even if decided in plaintiff's favor, alone do not constitute evidence of an agreement that a complaining distributor and a manufacturer agreed to fix prices.

It is incorrect to characterize the Supreme Court's decision in Monsanto as changing the summary judgment standard. As the Court said, "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." 465 U.S. at 762. Thus, evidence of communication does not raise a material issue of disputed fact. A plaintiff must introduce some kind of evidence, beyond the mere fact of communication, that tends to prove there was a price-fixing agreement; a theory or an inference that prices were fixed is insufficient to withstand summary judgment.

Section 8(a)(2) as added by S. 865 alters the standards for summary judgment. It permits a plaintiff to go to the jury on the basis of pure theory and conjecture, without having to introduce evidence of an actual agreement to fix prices. The fact that the plaintiff's theory may be "plausible" does not add anything to its evidentiary weight.

I hope this is responsive to Senator DeConcini's question. Please let me know if I can be of any further help.

Sincerely,

Joe Sims

Senator METZENBAUM. Mr. Rein.

STATEMENT OF BERT W. REIN, OF WILEY, REIN AND FIELDING, WASHINGTON, DC, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. REIN. Thank you. The U.S. Chamber appreciates the opportunity you have given us to explain why we oppose the enactment of S. 865 and why we believe it is adverse to the interests of consumers and why we believe it would present a trap to the unwary small businessman, whether manufacturer or retailer, as Senator Kohl so aptly pointed out, and why we also think it would be a stimulus to extensive, expensive, and unnecessary litigation.

Let me tell you where the Chamber stands. The Chamber believes that the American consumer himself should decide the proper mix of service and markup in retailing operations by voting with his or her patronage in the marketplace.

We have witnessed the explosive and continuing growth of discount operations in the last decade, and we applaud it. We have seen no evidence that that market success has been impeded by anti-competitive conspiracies either before or after the *Monsanto* and *Sharp* decisions.

In fact, looking at the record, most of the complaints we see really are about nonprice restraints or the use of *Colgate* rights; that is, unilateral rights on the part of a manufacturer or a dealer to not do business with somebody they don't want to do business with.

It is apparent to us that any manufacturer in a competitive industry who turns his back on the $150 billion discount retailing sector does so at his economic peril, and we see no reason to add legal peril to the economic peril in making that kind of decision.

Now, the Supreme Court decisions which are being overturned by S. 865 arise from the fact that despite the success of discount selling, there are manufacturers and dealers in this country—Mr. Hald is one of them—who are willing to stake their economic futures on the proposition that slightly increased gross margins and added service or an enhanced selling environment at the retail level will ultimately meet consumer needs better than price discounts.

Now, as Dean Pitofsky says, we are pejorative about free-riding. I think that term simply means that where one retailer is providing the service, or he is providing the environment in which you can make your choice because he has got a big line of goods and a nice display, he has got to find the gross margin to cover that, and it is going to be hard for him to do that if he doesn't have the volume he needs to cover it because that volume is diverted to somebody else who doesn't spend that money. That is all that free-riding is about.

Now, in the *Colgate* decision, which the supporters of S. 865 disclaim any intent to overturn, the Supreme Court held that a manufacturer could promote its interests in service retailing by suggesting resale prices and unilaterally refusing to deal with those who decided to depart from them. That is a proposition that is accepted here.

The *Monsanto* decision simply recognized that in a world where information about a dealer could often be obtained from another dealer—normal conversation—an accusation that a manufacturer acted in concert with dealers rather than on its own beliefs should be supported by more than evidence that information flowed.

S. 865 would wrongly undercut *Monsanto* by permitting an accusation of concerted action to be sustained by, and I am quoting from the bill, "circumstantial evidence that an implied request by one dealer that another be restrained was the major contributing cause of a termination or refusal to deal."

Now, that is a double inference. You infer from the circumstantial evidence that the inferential propositions exist, and you infer from those that the price-fixing conspiracy exists. That double inference would permit powerful discounters to bludgeon small manufacturers out of their *Colgate* rights and small dealers out of their commercial freedom of speech by permitting high-risk treble-damage litigation whenever manufacturers and dealers dare to discuss the potential impact of discount retailing on service-oriented retail operations.

As Dean Pitofsky said, the person you are going to sue is that dealer. It is not back to the old days of suing manufacturers; it is suing dealers. That is Mr. Hald, that is small dealers, and that is why we don't like it.

In the *GTE Sylvania* decision, which again is said by the supporters of S. 865 to be a fine decision, the Supreme Court held that a manufacturer could defend nonprice agreements designed to foster retail services under the antitrust rule of reason, thus making them lawful so long as the manufacturing market was competitive and there was no impact on competition.

The *Sharp* decision simply recognized that in a world where virtually all such nonprice agreements affect the price/service mix—that is what they are designed to do—an accusation that an agreement to make one dealer exclusive was, in fact, an agreement to set retail prices required some evidence of manufacturer-retailer price understandings.

S. 865 would overrule *Sharp*, and thus wrongly undercut *GTE Sylvania* by treating nonprice agreements like price agreements if they were entered into, quote, "because of a rival's pricing policies," whatever that means.

Since pricing and service policies are opposite sides of the same coin, this is a distinction without a difference.

We are aware that these critical challenges to *Colgate* and *GTE Sylvania* are now partially obscured in the ever-expanding language of S. 865 by a mass of circular and potentially contradictory language which may even allow—and I think Senator Kohl pointed this out—sophisticated enterprises with sophisticated counsel and nice document control systems to work their way around the bill and thus preserve their *Colgate* and *GTE Sylvania* positions.

But we see no public benefit of the costs of this kind of exercise and we are gravely concerned about the unfairness to small business of any legislation which makes huge consequences turn on form rather than substance.

Now, our written testimony also dealt with other aspects of the bill, including our somewhat intrigue over the distinction drawn between maximum and minimum price-fixing. We see the same question presented: Should there be some role for the manufacturer in discussing prices with the retailer? We are surprised that the committee would treat them differently.

[The statement of Mr. Rein follows:]

STATEMENT
on
THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989 (S. 865)
before the
SENATE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
Bert W. Rein
June 1, 1989

My name is Bert W. Rein. I am a member of the law firm of Wiley, Rein & Fielding. I am appearing today on behalf of the U.S. Chamber of Commerce, for which I serve as Chairman of its Council on Antitrust Policy. After careful consideration by that Council and the Chamber's Council of Small Business, the Chamber's Board has decided to oppose the so-called "Monsanto" legislation (S. 865). Its opposition is based on the conclusion that this legislation:

(1) is not warranted by any actual competitive problems in the marketplace where discounters are flourishing and retail competition thrives;

(2) would make antitrust enforcement turn on legalistic form rather than competitive reality, thus setting a trap for unwary small businesses that attempt to compete without sophisticated antitrust counsel and that are likely to become the principal targets of S. 865 actions;

(3) would replace carefully developed judicial interpretations of the Sherman Act with untested and opaque statutory language that will foment years of

wasteful litigation and stymie the flexible adaptation of distribution systems to consumer requirements; and (4) contrary to its title, would give specially favored status to "maximum" price-fixing, creating a potential loophole that could foster horizontal as well as vertical price fixing without regard to competitive impact.

I. S. 865 Is Not Warranted by Any Actual Competitive Problem in the Marketplace Where Discounters are Flourishing and Competition Thrives.

The Chamber has long opposed industry-specific legislative modifications of basic antitrust laws and believes that a strong factual showing of market distortion is required to support new antitrust offenses. S. 865 is clearly designed to favor discount retailing over service-based retailing, a choice that we believe should be made by consumers rather than Congress. Moreover, the "findings" in Section 2 of the bill that purportedly justify legislative action--that "recent court decisions have so narrowly construed the laws against vertical price restraints that consumer welfare has been put in jeopardy" and that "it is necessary to enact legislation that protects the interests of consumers in vigorous price competition . . ."--simply have no basis in fact. Similarly, rhetoric by sponsors of this legislation in the Senate and a similar bill in the House to the effect that the "rich array of retail outlets" from which

American consumers "can select their goods and services at the lowest possible prices" is "in danger of being drastically transformed" by price-fixing arrangements between manufacturers and high-priced retail outlets[1] and that this legislation is important, if not essential, so that the "typical family" can "continue to be able to save money by buying at discount stores" has nothing to do with market reality.[2]

Competitive reality is that discounters are thriving. The trade press projected discounter sales of $140.4 billion in 1988, up from $132.5 billion in 1987. Full-line discounters report steadily increasing sales and profits, as do specialty chains. The stocks of major discounters trade at relatively high price/earnings multiples on the New York Stock Exchange, indicating a high degree of investor confidence in this form of distribution and merchandising. Moreover, according to testimony offered by discount retailers in support of a similar bill, H.R. 1236, at hearings in March of this year (which testimony confirms impressions from casual observation of the retailing scene), so-called full price retailers are responding to discount competition by improving their operations, furnishing better service, and becoming more promotional and competitive on pricing. Just as these retailers cannot ignore consumer interest in discount operations, manufacturers in competitive industries can ignore discount retailers only at the manufacturers' extreme peril.

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[1] Opening Statement of Chairman Jack Brooks, Subcommittee on Economic and Commercial Law, Hearing on H.R. 1236, March 21, 1989.

[2] Congressional Record, p. S4435 (April 19, 1989) (remarks of Senator Metzenbaum).

When one considers that the Supreme Court's Monsanto decision was handed down in 1984, that the Reagan Administration's alleged nonenforcement of the antitrust laws against resale price maintenance continued unabated from 1981 to date, and that it has now been over a year since the Supreme Court's Sharp decision, one can scarcely conclude that "recent court decisions" have put consumer welfare "in jeopardy." If things were so bad, surely some adverse effects would be evident by now. Indeed, the single major retailing event since Sharp has been Sears' shift to everyday discount pricing, an event driven by marketplace considerations and reflecting no fear of repressive cutoffs post Monsanto and Sharp.

The lack of factual support for this legislation's major premises is further confirmed by the testimony of discounters on H.R. 1236, now pending before the House Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary. Instead of pointing to examples of actual problems that this legislation might be able to solve, these retailers complained primarily about manufacturer policies that this legislation is expressly said not to affect. One witness criticized furniture manufacturer policies strictly enforcing territorial restraints and prohibiting the use of 800 numbers by retailers, while another complained about manufacturer refusals to use co-op ad money to subsidize retailer advertising of prices more than a specified amount (in one case 29%) below suggested retail prices. In every case, the manufacturer materials submitted reserved full pricing discretion to retailers, and specific examples of price-related cutoffs or quantity restrictions were strikingly absent from the presentations.

In short, all available market evidence shows this nation's retail sector to be vigorously competitive and able to adapt to endlessly shifting consumer preferences in the price/service mix offered by competing retailers. In the Chamber's view, these circumstances provide absolutely no basis for legislative intervention designed to declare a price over service victory before the consumer jury is in and to cement that victory through burdensome and costly litigation.

The complete lack of factual basis for this proposed legislation should be fatal to it. Indeed, if Congress is willing to accord special antitrust relief to those who assert, rather than demonstrate, that it is necessary, it is difficult to conceive how Congress can preserve historic antitrust laws against future pleas from other interest groups for similar special antitrust legislation tilting the rules in their favor. For this reason alone, S.865 should be deferred until real evidence of the market effects of Sharp can be developed.

II. S. 865 Will Make Antitrust Enforcement Turn on Legalistic Form Rather Than Competitive Reality, Thus Setting a Trap for Unwary Small Businesses That Attempt to Compete Without Sophisticated Antitrust Counsel and That Are Likely to Become the Principal Targets of S. 865 Actions.

The proposed legislation is not only unnecessary, but also potentially harmful. Later in my testimony, I will illustrate how the confusing language in the bill will serve to encourage litigation and inhibit pro-competitive distribution decisions by manufacturers. Before reaching that point, however, I would like to stress the particularly adverse and discriminatory impact that the key aspects of the bill are likely to have on small businesses.

Under § 8(b) of the proposed legislation, "an agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies" is declared to be an antitrust violation. This new violation will almost certainly be alleged both against supplier/manufacturers and against purchaser/dealers who complain that discounter pricing pressures are making it impossible for them to meet their service obligations. Because a great many such complaints will undoubtedly flow from small servicing dealers, the litigation explosion likely to be fostered by S.865 will have small businesses as a principal target. Indeed, because small businesses cannot afford to withstand the cost of such litigation and the threat of being held jointly and severally liable for treble damages resulting from the alleged cutoff of a large discounter, traditional plaintiffs' antitrust tactics call for whipsawing small businesses into a quick settlement which can fund continuing litigation against their supplier/manufacturers. The practical result may be an end to effective communication between small servicing dealers and supplier/manufacturers and a stifling of the information needed for such supplier/manufacturers to optimize their distribution systems.

The discriminatory aspect of § 8(b) is also apparent upon examination of the complex interplay between highly hazardous price complaints and the necessary recognition that the GTE Sylvania rule of reason standard applies "to vertical location clauses or vertical territorial restraints under the antitrust laws." If a large dealer, who might actually pressure a manufacturer into dropping a discounter involuntarily, follows the advice of a careful lawyer and requests its supplier to grant it an exclusive territory or to limit the number of volume-diverting dealers in an area, and the manufacturer (equally well-advised) grants that request, the decision to grant an exclusive or limited distributor territory can be challenged only under the rule of reason. By contrast, if an uncounseled small dealer simply tells the manufacturer that he cannot afford to carry and service the manufacturer's line if other distributors in the territory continue to cut prices and the equally unsophisticated manufacturer responds by terminating a discounter, the manufacturer and distributor have committed a per se antitrust violation, exposing both of them to litigation and potential treble damage liability.

In both hypothetical cases, the economic effects are the same. The manufacturer elects to go with a single distributor or a limited number in a territory previously served by more distributors. In most cases, assuming adequate interbrand competition, such a decision will have no adverse effect on consumer welfare and may benefit consumers if the favored distributors are able to provide better service, benefit from economies of scale, or better promote the manufacturer's brand identity. If interbrand competition is weak, or if there are other reasons indicating that a limited distributorship situation is likely to be anti-competitive, the rule of reason provides a sound basis for an antitrust attack focused on the probable competitive impact of the new arrangement.

The proposed legislation, however, ignores these competitive realities and focuses instead on the form of words used by the parties. This in turn puts a premium on careful legal advice rather than on creative and competitive marketing. Large well-counseled dealers will be able to adjust to this legislation by casting their complaints as requests for "vertical territorial restraints" or "vertical location clauses." Smaller manufacturers and distributors, who do not have the time and the money to retain antitrust lawyers at all times, can face per se antitrust charges and resulting expensive litigation or settlement just for making the mistake of seeking the same result by using their own words rather than the magic words of the statute. To put it bluntly, S.865 will preserve Sylvania rights only for the well-counseled and will turn normal commercial communications into a trap for the unwary small businessman.

III. S. 865 Would Replace Carefully Developed Judicial Interpretations of the Sherman Act with Untested and Opaque Statutory Language, Which Will Foment Years of Wasteful Litigation and Stymie the Flexible Adaptation of Distribution Systems to Consumer Requirements.

The proposed legislation is also potentially harmful because it would replace carefully evolved yet flexible judicial antitrust doctrine with per se rules and complex inferences expressed in novel and unclear statutory language that would require years of litigation to clarify.

The Supreme Court's Monsanto and Sharp decisions, which have provoked the proposed legislation, are not judicial aberrations. In holding that "something more" than evidence of dealer pricing complaints followed by manufacturer action was necessary to prove a resale price maintenance conspiracy, the Supreme Court simply applied the traditional rule requiring either direct proof of a conspiracy or some showing that conspiracy is a more likely inference from challenged conduct than is independent action. Sharp added the further refinement that proof of an agreement between a manufacturer and a distributor to terminate another distributor does not establish a resale price maintenance agreement without proof of some kind of price agreement between the complaining distributor and the manufacturer. This result necessarily followed from the Court's desire to reenforce its 1977 GTE Sylvania decision, which held that non-price vertical restraints were to be tested under the rule of reason, not the *per se* standard. The Court reasoned that unless proof of a *price* agreement was required for *per se* treatment, GTE Sylvania would be undercut.

In short, *Monsanto* protects a supplier's unilateral *Colgate* freedom by reaffirming the requirement that § 1 of the Sherman Act requires concerted action, not simply unilateral action, while *Sharp* simply distinguishes between agreements to set resale prices and agreements to limit the number of resalers in a particular territory. Significantly, neither *Monsanto* nor *Sharp* deprived the discounter plaintiff of its day in court. In *Monsanto*, the Supreme Court found sufficient evidence to establish coercion action on resale prices from other conduct by *Monsanto*. In *Sharp*, the Supreme Court agreed with the Fifth Circuit's decision remanding the case for trial under the correct legal standard.

The Supreme Court's decisions in this area reflect the genius of antitrust law development. Operating under the broad "restraint of trade" standards of the Sherman Act, courts are free to develop the law as the evolving facts of economic life reflected in the cases before them dictate. The flexible rule of reason provides a judicial tool through which the courts can identify and impose sanctions on anti-competitive conduct while avoiding over-deterrence of neutral or pro-competitive acts.

By contrast, S. 865 replaces judicial flexibility with prolix and opaque statutory language.

Specifically, the proposed legislation (1) modifies the standard of proof required to establish a "jury" case of concerted action and (2) creates a new per se unlawful type of concerted action, i.e., "an agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies. . . ."

Under the proposed legislation, a civil antitrust court must apparently allow the trier of fact (presumably but not necessarily a jury) to find a "contract, combination, or conspiracy" based on evidence that a seller of a good or service "received from a competitor of the claimant an express or implied request or demand . . . that the seller take steps to curtail or eliminate price competition by the claimant in the resale of such good or service" and that this communication was "the major contributing cause" of the seller's terminating or refusing to supply the claimant. Moreover, once there has been an "agreement" and a price based "termination," the new per se offense of § 8(b) has been committed.

In mandating an inference of agreement sufficient to reach a jury from an "implied request" by one dealer that "price competition" by another be curtailed coupled with an inherently speculative and subjective causal showing that is likely to be "proved" by the juxtaposition of events, the proposed legislation will throw courts into an endless quagmire. For example, a supplier who responds to the pricing information in a dealer complaint, rather than its "implied request" for action, presumably avoids the inference provided by Section 8(a)(1)(B)(ii). On the other hand, a supplier who reacts to the "implied request" rather than the information is subject to the inference unless, of course, the "implied request" is to terminate all competition and preserve the requester's scale economies rather than to eliminate "price competition." It is difficult for the Chamber to believe that multimillion dollar consequences should ride on these unfathomable distinctions or that this nation's dynamic distribution system should be regulated by the artistry with which documentation can portray requests or causes.

Moreover, as noted above, the new "agreement" offense established by Section 8(b) rests on an equally metaphysical distinction between an agreement to terminate or curtail a dealer because of its "pricing policies" and an agreement to terminate or curtail a dealer because of its "servicing policies" or because a competing dealer needs broader scope or scale to perform its market functions. The plain fact, as recognized by the Supreme Court in Sharp, is that "pricing policy" and "service" are opposite sides of the same coin. Terminations for either reason in situations where market power adverse to consumers is created can offend the antitrust laws. Terminations that, on the other hand, reflect only manufacturer efforts to enhance a distribution system in a competitive environment should not be litigated. Premising antitrust sanctions on which side of the coin turns up in a random flip before a jury protects only the business of antitrust litigation and cannct, in the Chamber's view, be a sound basis for legislation.

IV. Contrary to Its Title, S. 865 Would Give Specially Favored Status to "Maximum" Resale Price-Fixing, a Potential Loophole That Could Foster Horizontal as well as Vertical Price-Fixing Without Regard to Competitive Impact.

A somewhat remarkable feature of a bill allegedly preserving dealer pricing flexibility is its new provision excepting agreements "to set, change, or maintain the maximum resale price of a good or service" from its general per se ban on resale price agreements.

This provision is apparently intended to overrule the Supreme Court's 1968 Albrecht decision, which found illegal a newspaper's efforts to force its independent distributors to adhere to the newspaper's maximum prices. Whether or not the per se doctrine of the 21-year-old Albrecht decision now requires legislative or judicial revision, the legislative sanction for "maximum price fixing" in S. 865 could become a loophole permitting plain old-fashioned price fixing under the guise of "maximum" price setting.

The Albrecht situation involved potentially differing supplier and distributor interests. The newspaper in effect wished to sell its publications at the lowest possible price, thus maximizing its circulation and therefore its advertising revenues. The independent distributors, on the other hand, had to make their money from distribution. Under the logic that S. 865 applies to sellers who might wish to secure their objectives by agreeing on minimum resale prices with a dealer, the newspaper clearly had non-price alternatives for accomplishing its objective. For example, it might have been able, without obtaining price agreements, to replace its distributors with more efficient or less greedy ones. Or it could have distributed through employees selling its own product directly to the consumer. Naturally, as in the case of minimum price agreements, each such non-price technique would have raised problems of its own. The Chamber finds it difficult, however, to understand why these problems are sufficient to accord "rule of reason" flexibility to suppliers seeking to minimize dealer services through price caps but insufficient to accord the same flexibility to suppliers seeking to maximize service through price floors.

S. 865 adopts for the first time the legislative principle that some forms of resale price maintenance are not illegal per se. Thus, quite plausibly, a manufacturer wishing to end price cutting might do so by holding a series of discussions and reaching agreements to "set" or "change" a "maximum resale price." Distributors who believe that a manufacturer's suggested resale price does not give them sufficient margins would apparently be free to seek and receive agreements to set higher "maximum resale prices." If the manufacturer went further and obtained the agreement of several other dealers to sell at the new maximum price, would we have an old-fashioned illegal price-fixing conspiracy or a new-fangled lawful "maximum resale price" agreement?

The point again is that S. 865 exalts form over substance in an apparent accommodation to special interests and a failure to recognize that market power, rather than the inevitable fallout of competitive changes, is the evil to which antitrust enforcement should be addressed.

Conclusion

S. 865 is unnecessary and misguided special interest legislation, whose proponents can show no factual basis for it. It will not benefit consumers, and it will harm small- and medium-sized businesses by exposing them to serious litigation risks based on purely formal distinctions. It will create uncertainty and foment litigation by substituting novel *per se* statutory standards for settled and well-founded judicial interpretation. Its "maximum resale price" exception is a questionable anomaly in a supposed anti-price fixing bill. For all these reasons, the Chamber opposes S. 865.

Questions from Senator DeConcini
To Bert W. Rein, U.S. Chamber of Commerce, Chairman of its Council on Antitrust Policy

1. Mr. Rein, you have stated that S. 865 has a discriminatory effect. Large companies that can afford counsel will supposedly couch their complaint to manufacturers in terms that will not implicate S. 865 while small, uncounseled dealers will more likely word any complaints they may have in terms that fall directly under S. 865. Doesn't the first requirement for establishing "sufficient evidence", that the complaint is either an express or IMPLIED request or demand, alleviate this potential for a discriminatory effect under S. 865?

2. Mr. Rein, you suggest that Monsanto and Sharp's refinement of Monsanto offer sufficient protection to a supplier and a complaining distributor against unwarranted antitrust allegations, and to a terminated distributor against illegal vertical price setting. Doesn't Sharp's requirement of proof of some kind of price agreement between the complaining distributor and the manufacturer before the case can go to a jury place an almost insurmountable burden of proof on any business that has been the victim of such an agreement?

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June 23, 1989

Ms. Theresa Lauerhass
Senate Judiciary Committee
Antitrust Subcommittee
Washington, D.C. 20510

Dear Ms. Lauerhass:

In response to Senator Metzenbaum's letter of June 16, I attach my answers to Senator DeConcini's questions.

Sincerely yours,

Bert Re

Bert W. Rein

BWR:lhw
Attachment
cc: Jeffrey Perlman

Question: Mr. Rein, you have stated that S. 865 has a discriminatory effect. Large companies that can afford counsel will supposedly couch their complaints to manufacturers in terms that will not implicate S. 865 while small, uncounselled dealers will more likely word any complaints they may have in terms that fall directly under S. 865. Doesn't the first requirement for establishing "sufficient evidence," that the complaint is either an express or IMPLIED request or demand, alleviate this potential for a discriminatory effect under S. 865?

Answer: No. If the "implied request" language is read in the context of Section 5 of S. 865 (safeguarding rule of reason treatment for "vertical location clauses or vertical territorial restraints"), and the repeated assurances of the bill's sponsor that non-price vertical restraint law is not affected by S. 865, then a well-counseled dealer can react to discount competition without triggering S. 865 by requesting territorial exclusivity, by bringing up service deficiencies or by suggesting the establishment or enforcement of other non-price vertical restraints. A small, uncounselled dealer, on the other hand, may respond to the same commercial pressures by complaining to a supplier that discount price competition is making it impossible for him to carry the supplier's product and thus run squarely into S. 865's presumption. As the Supreme Court correctly noted in Sharp, suppliers can affect dealer-level price competition in response to dealer complaints by imposing non-price restraints to protect servicing dealers and these restraints may lead directly (e.g., exclusive territories) or indirectly (e.g., service conditions) to the termination of discount dealers. Unless S. 865 is intended, contrary to the representations of its sponsors, to subject these non-price restraints to per se condemnation because they affect price, the form of supplier-dealer communications and actions (rather than their economic effect) will become a critical, and discriminatory, factor under S. 865.

Question: Mr. Rein, you suggest that Monsanto and Sharp's refinement of Monsanto offer sufficient protection to a supplier and a complaint distributor against unwarranted antitrust allegations, and to a terminated distributor against illegal vertical price setting. Doesn't Sharp's requirement of proof of some kind of price agreement between the complaining distributor and the manufacturer before the case can go to a jury place an almost insurmountable burden of proof on any business that has been the victim of such an agreement?

Answer: No. The Sharp requirement only distinguishes price from non-price restraints. If a complaining distributor cannot produce evidence of a price agreement, he may still get to the jury by presenting evidence that an agreement to terminate him had a sufficiently adverse competitive impact on consumers to warrant condemnation under the rule of reason. If he is unable to provide evidence of either a price agreement or an anticompetitive effect, there is no proper basis for a jury to consider an *antitrust* violation. Whether the injury to the complaining dealer arising from an agreement to terminate him between his supplier and his competitor should give rise to a tort remedy or contract remedy is a matter properly addressed by state law. The virtue of *Sharp* to that it properly recognizes the distinction between the *per se* harm allegedly caused to competition by resale price agreements and the harm to specific competitors caused by terminations not arising from a resale price agreement.

Senator **Metzenbaum**. Thank you very much, Mr. Rein.

We are very happy to see that Senator Specter has joined us. I know he had an amendment on the floor and couldn't be with us earlier. Senator Specter, the Chair is going to take about 5 minutes for a few questions, then turn the meeting over to you for an opening statement or such questions as you might want to ask, with the opportunity to adjourn the meeting as well.

Senator **Specter**. Thank you.

Senator **Metzenbaum**. Isn't that great? Thank you.

Mr. Hald, could you give me a little description of your business?

Mr. **Hald**. Yes. We are a—we have 170 locations in the United States; 160 are franchised, with an average volume of approximately 2.1 million per franchise, hired about 12 individuals, on average.

Senator **Metzenbaum**. What is distinctive about your business? What is different?

Mr. **Hald**. We focus in on selling to small, medium, and large businesses commercial computer systems, small business accounting, office integration.

Senator **Metzenbaum**. Do you have an objection generally to the antitrust laws which say that manufacturers can't tell you how to set your prices? Is that objectionable to you?

Mr. **Hald**. That is correct, I do.

Senator **Metzenbaum**. Are you opposed to the antitrust laws generally with respect to the whole question of free competition in this country?

Mr. **Hald**. No. In fact, my feeling is two-fold. One, to have a free economy, you have to be able to choose with your dollars, but also you have to have a quality of choices before you. I believe today's antitrust laws provide for a quality of choices not only on price, but also on ranges of service.

Senator **Metzenbaum**. So, as I understand you, you think that a manufacturer can and should tell you—I guess you haven't said "should," but can tell you what prices products should be sold at?

Mr. **Hald**. I am sorry. Say that again, Senator.

Senator **Metzenbaum**. You say that you believe that a manufacturer should be able to tell you what price your product can be sold at?

Mr. **Hald**. I prefer to have the option to determine my own prices for products sold.

Senator **Metzenbaum**. Well, you are not the manufacturer, are you?

Mr. **Hald**. No.

Senator **Metzenbaum**. So that what I am asking you is whether or not you feel that the manufacturer should have the right to tell you at what price the product may be sold, and you are saying that you don't think he ought to have that right?

Mr. **Hald**. I don't think he should have the right. That is correct.

Senator **Metzenbaum**. Do you believe that a competing retailer should be able to make an agreement with a manufacturer to cut you off if you discount your prices?

Mr. **Hald**. Should a competing retailer——.

Senator **Metzenbaum**. Should a competing retailer be able to make an agreement with a manufacturer to cut you off in the event you cut your prices? Should your competitor be able to agree with a manufacturer that you can be cut off if you cut prices?

Mr. **Hald**. In such that there is basically a conspiracy on their part to put me out of business, no, I don't agree with that.

Senator **Metzenbaum**. Now, all we are doing in clarifying *Monsanto* is asking that a jury be able to review all the evidence of an alleged conspiracy. Why do you think it is so bad that we let a jury look at the facts of the case?

Mr. **Hald**. I think you are doing a lot more than that, Senator, with all due respect, in this bill. First, I think the way you are defining the whole question of causation—a lot of innocent communication that is necessary that goes on within the industry could be construed as an act to fix prices.

On top of that, when it is brought to jury, all they have to show in the jury trial is the fact that pricing was discussed in order to convict. Now, at least the way I understand the current antitrust laws, you need to demonstrate an agreement in order to bring this to trial.

My concern here is you are going to get a lot of spurious litigation. We are going to find situations where dealers will utilize this law in order to allow them to bypass service covenants and agreements, and in our industry that is a very, very serious problem because we are expected to have service techs in every one of our locations. That increases our cost of business, and we do it to service the clients and to be in conformance with a vendor's requirements to support their product.

If, suddenly, the guy down the street who is also authorized feels he doesn't have to do this and feels he can get away with it because all he has to do is claim the fact that, gee, anything you talk about—if you complain about my service practices, it is price-related—the manufacturer won't enforce that contract and it is basically unfair to the way we do business.

Senator **Metzenbaum**. Thank you, Mr. Hald.

I might say that both Mr. Sims and Mr. Rein are here saying what is good for the consumers, whereas every consumer group in the country is supporting this legislation. So I never really before have heard the Chamber come out as being the great spokesperson for the consumer, and not too often the ABA, but let us go on with that.

The new chairman of the ABA Antitrust Section, in discussing resale price maintenance, recently said that the incoming antitrust leaders of the Bush administration should stop tilting at windmills and discard the rhetoric of the last administration.

Are you now saying that the ABA policy is to oppose putting the per se rule into law?

Mr. **Sims**. No, sir, not at all. I might comment on this continual reference to Justice Department activity or inactivity, though, which I think is somewhat misleading. As somebody who served at the Antitrust Division for about 8 years during the 1970's, I can tell you that it is not the last 8 years that we saw no vertical price-fixing cases; it is about the last 20 years.

This development in the law—*Monsanto, Sylvania, Sharp*—these are all private cases. These are not government cases, and the government really has not been a prime player in this movement of the law. This has been something that the courts have done without the benefit of assistance from either the FTC or the Antitrust Division.

Senator **Metzenbaum**. I will call my own red light on myself and turn the meeting over to Senator Specter.

Senator **Specter** (presiding). Thank you very much, Mr. Chairman.

I would be interested to know what is happening in the litigation field in this area. Are lawsuits being brought in light of the limitations which the Supreme Court has handed down on getting these cases to juries?

Mr. **Rein**. Senator, I don't believe the cases have disappeared. We have taken a look at the cases. A number of them are still going to juries and coming in with successful verdicts for plaintiffs.

I think that the volume overall is somewhat down. There have been accounts made of that, but I think what we are eliminating——.

Senator **Specter**. Are there statistical studies on it?

Mr. **Rein**. There are the filings each year in the district courts. You can count up the number of antitrust cases. You can look at the trends and total numbers.

Senator **Specter**. On this subject?

Mr. **Rein**. A cataloging has been done by different types of allegations, whether they are vertical, whether they are horizontal. Vertical litigation provides the great bulk of the cases.

Senator **Specter**. Are those statistics available so that this committee could see them?

Mr. **Sims**. I believe the Administrative Agency of the United States Courts collects those statistics, and I am sure they are available to the Congress, yes.

Mr. **Rein**. They are matter of public record, Senator, and I think they would show you that the——.

Senator **Specter**. Are you personally aware, Mr. Rein, of a verdict for the plaintiff in this field in the past year?

Mr. **Rein**. I am aware of a—I think there was a survey done, and I could provide it for the record, of cases that are post-*Monsanto*, including cases that have gone to the jury. I guess we could get the verdicts in those cases, Senator. I would be glad to provide it. I don't think that——.

Senator **Specter**. My question was, are you personally aware of a verdict for the plaintiff in this field in the past year?

Mr. **Rein**. I haven't really looked, and I will be candid. I have looked at the judicial rulings.

Senator **Specter**. Mr. Sims, are you aware?

Mr. **Sims**. No, and I think it is quite clear, Senator, that not only is the number of cases, private litigation, in this area down, but the incidence of successful cases by plaintiffs is down dramatically.

Senator **Specter**. My question goes to any.

Mr. **Sims**. I can't answer the question because I haven't done a survey. There have been a number of cases which——.

Senator **Specter**. You are active in this field. I just want to know if you know of any.

How about you, Mr. Hald?

Mr. **Hald**. I don't know of any in our industry, primarily because discounting is extremely prevalent and normal practice in our business. I mean, this is "Washington Business" of May 29th. Of the 34 ads, 25 are computer discount ads.

Senator **Specter**. In the Senate, we study S. 430; we debate it a lot and we argue about it a lot. We have S. 865. We debate it and we argue about it a lot, and I always wonder what is really going on in the courtroom and what is the effect of *Monsanto* and what is really happening.

Mr. **Sims**. To some extent, Senator, that may not be the complete question. I mean, the real question is, is there any substantial amount of resale price maintenance, vertical price-fixing, which is not being successfully uncovered and prosecuted either by public or private plaintiffs.

The answer to that question, I would say, is not going to be answered by looking at the number of cases, nor looking at the number of plaintiffs 'victories.

Senator **Specter**. Well, you have just postulated the question which can't be answered and so have I.

Mr. **Rein**. I think, Senator, the statistics and what we have done and can provide for the record and study—you can look at the number of cases. You can look at the number of instances in which the courts have precluded a plaintiff from going to the jury, and that really is the relevant question in S. 865. Where are summary judgments being issued?

There are many cases in which summary judgment is not entered on behalf of the defendants, which means the case goes to the jury. We could track those down, but I don't think S. 865 is intended to get to the verdict. It is intended to get to the jury.

So the real test is, are there cases—and we certainly know there are—in which the courts have permitted the question of conspiracy to go to the jury post-*Monsanto* and post-*Sharp*, and the answer to that is yes, there are. There are a good many of them.

Senator **Specter**. It is more than going to the jury. It is the charge under which the jury deliberates.

You raised a question, Mr. Sims, about public or private actions. To what extent are there public actions in this field?

Mr. **Sims**. There have been virtually none for the last two decades, really.

Senator **Specter**. Any?

Mr. **Sims**. Oh, yes. In fact, during the Carter administration there was a criminal prosecution for resale price maintenance.

Senator **Specter**. What was the result?

Mr. **Sims**. The result, I believe, was a plea bargain. I don't think the case was litigated. That was the *Cuisinart* case. That was a highly unusual action, however, and the only criminal action in recent memory, certainly. But there have been a number of other public prosecutions if you go back over the last two decades.

One of them was mentioned earlier today against Levi Strauss by the FTC.

The fact of the matter is that resale price maintenance, as such, has not been a major priority or a major focus of either of the Federal agencies for at least the last two decades, and perhaps more.

The activity in this area during the time when it was a plaintiff's ball game and there was a lot of activity, and the time today when there is less activity and plaintiffs have less advantages than they used to have, has always been private activity. It has never been public activity.

Senator SPECTER. You talk about some public activity during the Carter administration. Any cases during the Reagan administration?

Mr. SIMS. No, I don't believe there have been any cases during the Reagan administration, but I don't believe there were any during the Ford or Nixon administrations either.

Senator SPECTER. How about the Johnson administration?

Mr. SIMS. I can't answer that question. I don't know the answer.

Mr. REIN. There are very few public cases going back to the dawn of the Sherman Act. There are some State-level cases that have been brought under comparable legislative standards, indicating that it is not impossible to bring them, and indeed that maybe some of these controversies are highly localized; that is, they take place in specific markets where State enforcement is appropriate.

Senator SPECTER. Is there any indication what the attitude is of the Bush administration on this subject?

Mr. REIN. I believe that you will have a Bush nominee for an assistant attorney general for antitrust to ask about that, but I don't think there has been any statement from this administration.

Senator SPECTER. I know Mr. James Rill is coming in to see me this afternoon. That there is going to be a nominee, I am aware, but I just wondered if there had been any statement of policy.

Mr. SIMS. I am not aware of any such statement.

Senator SPECTER. Well, the hour is very late. I regret that I could not have been here earlier, but I was occupied with a floor amendment, as Senator Metzenbaum had commented. In the absence of any other Senators, that concludes the hearing and we thank you very much for coming.

[Whereupon, at 12:28 p.m., the committee was adjourned.]

APPENDIX

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 1 4 1989

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is a statement by Michael Boudin, Acting Assistant Attorney General of the Antitrust Division, for consideration by the Committee in connection with S. 865, the Consumer Protection Against Price-Fixing Act of 1989. We request that the Committee place this statement in its record of the hearing on this proposed legislation held on June 1, 1989.

Thank you for considering the views of the Department on this important issue.

Sincerely,

John P Mackey for
Carol T. Crawford
Assistant Attorney General

Enclosure

STATEMENT OF

MICHAEL BOUDIN
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

SUBMITTED TO

THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 865

A BILL TO AMEND THE SHERMAN ACT
REGARDING RETAIL COMPETITION

The Department of Justice appreciates the opportunity to submit its views on S. 865 to the Subcommittee. Entitled the "Consumer Protection Against Price-Fixing Act of 1989," S. 865 would: (1) create a presumption of concerted behavior designed to overcome the evidentiary requirement recognized by the Supreme Court in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), that two or more persons must be shown to have conspired to restrain trade in order for Section 1 of the Sherman Act to apply; (2) codify a standard of per se illegality for agreements to fix or affect resale prices for purposes of determining whether a seller and a purchaser actually have violated Section 1; and (3) expressly overrule the recent Supreme Court ruling in Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988), that a manufacturer's understanding with one dealer to terminate another dealer is not necessarily equivalent to an agreement between the manufacturer and the first dealer to fix resale prices.

Two bills in the 100th Congress, S. 430 and H.R. 585, contained provisions that would have overruled Monsanto and codified the standard of per se illegality for resale price maintenance. S. 865 incorporates these features and, in addition, adds a provision that would have the effect of overruling the Sharp Electronics case.

S. 865 is essentially identical to a proposed amendment in the nature of a substitute for S. 430 submitted late in the 100th Congress, which sought to deal with some of the concerns raised by the Department and others with the previous bills. Indeed, the substantially reformulated language and additional provisions in S. 865 underscore the seriousness of these concerns. However, the Department continues strongly to recommend against enactment of this legislation. Our reasons, which are similar to those we expressed previously in comments on earlier proposals, 1/ are set out below.

REVERSAL OF MONSANTO

The Department remains most concerned with legislation that would reverse Monsanto. Apparently because of dissatisfaction with certain language in the Monsanto opinion and some lower court decisions applying that language in particular circumstances, S. 865 would substitute a few words and phrases for extensive case law on what constitutes challengable concerted action under the antitrust laws. As set forth below, the case law has developed over decades and has provided a highly workable, if not always perfect, resolution of the

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1/ See, e.g., Letter from Thomas Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, to Hon. Strom Thurmond, United States Senate (September 23, 1988), which sets forth the Department's objections to the substitute amendment.

competing values that underly a fair and efficient distribution system in a competitive economy.

For 70 years the law has protected the right of firms to decide unilaterally with whom they will deal. In Dr. Miles Medical Co., 2/ the Supreme Court early held that a manufacturer may not agree with its dealers on minimum resale prices. However, in the Colgate case 3/ decided soon after Dr. Miles, the Court made clear that only resale price maintenance agreements violate the Sherman Act, and that a manufacturer acting unilaterally may set resale prices and enforce adherence to those prices by terminating non-complying dealers. In Parke, Davis, 4/ the Court expounded upon and carefully circumscribed the Colgate doctrine, focusing antitrust attention on all the facts and circumstances surrounding a manufacturer's resale price maintenance efforts. And most recently, in Monsanto, which upheld a jury's treble-damage award based on sharply conflicting evidence, the Supreme Court correctly applied the law in this area by stating that it is improper to infer a resale price maintenance

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2/ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

3/ United States v. Colgate & Co., 250 U.S. 300 (1919).

4/ United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

agreement from the fact that a manufacturer learns of a dealer's unacceptable pricing policy from another dealer. The Court recognized that the critical issue is whether the manufacturer's decision was an independent one or was undertaken pursuant to an agreement with someone else. Monsanto is fully consistent with the previous cases.

Dr. Miles, Colgate, Parke, Davis, and Monsanto are not a separate body of law, to be somehow distinguished from general antitrust principles. Because of the crucial nature of the distinction between illegal concerted conduct and legal unilateral conduct, courts always have dealt with utmost care with the evidentiary issue of whether circumstantial evidence of a particular sort should be sufficient to permit the inference of an agreement. In what is perhaps the seminal case in this area, Interstate Circuit, 5/ there was no proof of an explicit agreement, but each company knew that parallel action was contemplated, knew which other companies had been invited to participate, and knew that the cooperation of all was essential to the success of the alleged restraint. Importantly, each company benefited only if all adhered to the common scheme--the conduct would not have been in the interest

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5/ Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

of any single participant acting alone. On this record, the Supreme Court held that an agreement could be inferred. By contrast, in Theatre Enterprises, 6/ a number of companies had engaged in similar behavior, but their conduct was in the individual interest of each, regardless of what course the others chose. There was no direct evidence of agreement, only of independent choices by different companies to adopt the same course. On that record, the Supreme Court upheld a jury verdict finding no conspiracy.

Cases relying on Interstate Circuit or Theatre Enterprises are legion; their common thread is that the infinite variety of facts that attend business conduct must drive the conclusion as to whether an agreement is legitimately inferable on the basis of circumstantial evidence. No one fact is determinative. Given the great importance of the difference between concerted and unilateral activity in antitrust, the significance of this evidentiary truth cannot be overstated.

Legislation along the lines of S. 865 could do great harm in cases alleging unlawful fixing of resale prices. Such legislation would allow a presumption of conspiracy from

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6/ Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

evidence that is equally consistent with unilateral decision-making. It thus could lead to erroneous conclusions on the key factual issue, disturbing irrevocably the careful distinction drawn in the Dr. Miles and Colgate cases between unlawful concerted activities and legitimate unilateral conduct by manufacturers. Simply put, such legislation likely would confuse and contort the search for truth in resale price maintenance cases.

REVERSAL OF SHARP ELECTRONICS

The Department also opposes legislative reversal of the Sharp Electronics decision on the question of what constitutes a prohibited resale-pricing agreement. Such legislation could undermine the well-established ruling of the Supreme Court in Sylvania 7/, which held that nonprice distribution agreements between maunufacturers and dealers are to be judged under a rule of reason standard, not a per se standard. S. 865 would potentially transform virtually any agreement between a manufacturer and one or more dealers concerning the termination of a dealer into an agreement to set resale prices.

7/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

As the Supreme Court recognized in Sylvania, the effects of price and nonprice vertical restraints often will be similar. For example, a manufacturer may grant to its dealers exclusive territories within which each distributor has an exclusive right to sell the manufacturer's product free from intrabrand competition from other dealers. Although such agreements may affect intrabrand price competition, they have been analyzed under the rule of reason rather than the per se rule at least since the Sylvania decision. In Sharp Electronics, the Supreme Court carefully resolved the inherent tension between the Sylvania rule of reason on nonprice vertical restraints and the per se illegality of vertical agreements to fix resale prices.

Although legislation may attempt to ensure that vertical territorial restraints will continue to be accorded rule of reason treatment, as a practical matter it will often be difficult to determine whether a particular restraint is purely nonprice related. For example, should a manufacturer seek to enforce its exclusive territories by terminating a dealer who violates the agreement and sells in another dealer's territory, the terminated dealer may well be able to argue that its termination was price-related, and is thus per se illegal. By requiring proof of agreement on price in dealer termination cases, the Court in Sharp assured that its Sylvania decision would not be abrogated by endless, uncertain litigation over how best to characterize dealer termination where the manufacturer and the remaining dealers have not agreed on the latter's prices.

CODIFICATION OF A PER SE RULE

Of equal concern to the Department is the establishment of a statutory per se rule against resale price maintenance agreements. Attempts to define per se Sherman Act violations through particularized statutory language are at odds with the flexibility and utility that Congress wisely imparted to that Act in 1890 by declaring its prohibitions in only the most general terms. Any standard for antitrust liability not explicitly pegged to adverse effects on competition is particularly susceptible to producing at best confusion and at worst anticompetitive results.

Our principal antitrust statutes were purposefully drawn in broad, general terms. 8/ The Sherman Act proscribes "[e]very contract, combination . . ., or conspiracy in restraint of trade or commerce . . .," as well as monopolization or attempts or conspiracies to monopolize any part of trade or commerce. This statutory generality, keyed to competitive effect, has

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8/ See, e.g., Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958) (the antitrust laws comprise a "comprehensive charter of economic liberty").

facilitated effective antitrust enforcement over the years, leaving room for judicial extension or correction of antitrust precedent as warranted.

Attempting to codify a rule against resale price maintenance agreements would be an unnecessary and unfortunate departure from years of antitrust tradition. In particular, statutory language that ignores competitive effects is virtually certain to produce aberrant results--liability where no competitive harm has been done. Per se rules, as useful as they have been in antitrust jurisprudence, are simply not appropriate to codification.

Perhaps the best and most pertinent example of the need to keep per se rules flexible is the antitrust history of nonprice vertical restraints. The Supreme Court first addressed the antitrust status of such restraints in White Motor Co., 9/ which required them to be evaluated under a rule of reason. Only 4 years later, however, in the Schwinn case, 10/ the Court formulated a per se rule against agreements by manufacturers and dealers that limited dealers' rights to sell outside their assigned territories and to sell to unfranchised dealers.

9/ White Motor Co. v. United States, 372 U.S. 253 (1963).

10/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

After 10 years of confusion as to the scope of the rule and debate as to its wisdom, the Court overruled Schwinn, holding that the possible procompetitive aspects of such agreements required a rule of reason analysis of nonprice vertical restraints. 11/ It concluded that a per se rule that did not focus on the competitive effects of such conduct would produce incorrect results in some cases. In the words of the Court, any per se rule should be "based on demonstrable economic effect rather than . . . upon formalistic line drawing." 12/ The White Motor-Schwinn-Sylvania history illustrates the need for the courts to be able to modify as well as interpret and apply per se rules correctly when fact and economic theory are compelling. 13/

Such situations were not unanticipated when the antitrust laws were first put in place. The drafters of the Sherman Act recognized that only the broadest statutory guidance should be given, to be amplified and explained through individual cases. Senator Sherman himself noted that

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11/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

12/ Id. at 58-59.

13/ In a number of other instances, the Supreme Court has stressed the need for flexibility in applying and revising per se rules. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery Co., 472 U.S. 284 (1985); NCAA v. Board of Regents, 468 U.S. 85 (1984).

> . . . it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do, is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. 14/

Unlike the generalized statuory language that we have used to date in antitrust, precise and conclusory statutory antitrust rules not expressly based on competitive effect would lack the flexibility necessary for optimum enforcement. Under a detailed statute such as S. 865, antitrust inquiry would focus on the meaning of particular words and phrases, and on obscure and possibly inconsistent legislative history. Analysis of competitive effects would be, if relevant at all, secondary. Where the statute's particularized language turns out to be overinclusive, it would condemn behavior that should not be prohibited. Where underinclusive, it would open inappropriate loopholes. And when problems were recognized, legislative correction could be a slow and difficult process, often resulting in new legislation with still more terms to interpret. Industry-specific statutory antitrust exemptions provide good examples of the risks inherent in a particularized

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14/ 21 Cong. Rec. 2460 (1890), cited in 1 The Legislative History of the Federal Antitrust Laws and Related Statutes 19 (E. Kintner, ed. 1978).

statutory approach to antitrust law unbridled by consideration of effects on competition. Thus assistant attorneys general as diverse as Thurmond Arnold and William Baxter have advocated the careful development of antitrust principles through case law. 15/

SUMMARY

S. 865 is essentially identical to a proposed amendment in the nature of a substitute for S. 430, offered during the 100th Congress. In its prior comments on this substitute, the Department concluded that despite diligent efforts to improve upon previous versions of the bill, none of the serious problems presented by the original version of S. 430 had been solved. 16/ Indeed, it is our view that the difficulties in formulating a bill along the lines of S. 865 are symptomatic of a deeper problem: The area of vertical price and nonprice restraints is one that is inherently resistant to explicit legislative demarcation. Rather, it is an area that requires a considered approach through judicial precedent to the myriad

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15/ T. Arnold et al., The Sherman Act and its Enforcement 14-15 (1940); Baxter, The Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law, 60 Tex. L. Rev. 661, 667-68 (1982).

16/ Letter from Thomas Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, to Hon. Strom Thurmond, United States Senate (September 23, 1988).

commercial and distribution arrangements that a competitive economy engenders. Because any such legislation runs an unacceptable risk of inhibiting manufacturers and dealers from entering into procompetitive distribution arrangements in a wide variety of markets, as with previous bills in this area the Department must express its opposition to S. 865.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

June 16, 1989

The Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Thank you for your letter of June 8, 1989, requesting my comments on S. 865. The proposed legislation would codify a per se prohibition of resale price maintenance in spite of the widespread consensus among antitrust scholars that resale price maintenance is often procompetitive. Moreover, under the bill, legitimate resale pricing policies, imposed unilaterally by sellers, would be treated as unlawful price fixing conspiracies. For these reasons, S. 865 is likely to have adverse consequences for competition, and I strongly oppose its enactment.[1]

I. S. 865 Is Not Consistent With Contemporary Learning on Resale Price Maintenance

S. 865 would codify into law a per se prohibition of minimum resale price maintenance. I believe that this proposed codification is inconsistent with the interests of consumers and is at odds with current economic understanding of the practice. Most antitrust and economics scholars share the view that vertical restraints, including resale price maintenance, often serve procompetitive purposes. Suppliers frequently impose such restraints to facilitate the delivery of services to consumers. These services include informing consumers of product features and attributes, servicing the product both before and after the sale, and promoting the product.

In many cases, suppliers find it necessary to have dealers inform consumers fully about their product in order to sell it. Acquiring the necessary expertise and conveying the desired information to consumers can be costly, however, and few dealers would be willing to incur these costs and provide the services if consumers can receive these services from one dealer and then find it advantageous buy the product from another dealer. In the absence of restraints, dealers who do not provide retailing services may be able to "free ride" on those who do. By failing to provide services, they can enjoy lower costs than their full service competitors and therefore may be able to underprice them. Consumers may then take advantage of the services provided by the higher price dealers but buy the product from the discounting free riders. This effect may discourage all dealers from providing the desired services. Vertical restraints may be used to deter free riding and thereby preserve dealer incentives to furnish services that consumers value.

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[1] The views expressed in this letter are my own and do not necessarily represent the views of any other individual Commissioner or the Commission as a whole.

The procompetitive use of vertical restraints to overcome the "free rider" effect was recognized by the Supreme Court more than ten years ago in Continental T.V., Inc. v. GTE Sylvania, Inc.,[2] in which the Court held that non-price restraints imposed by a firm on its distributors are legal if reasonable. GTE, of course, involved non-price vertical restraints and this bill addresses price restraints, but it is apparent that both price and non-price vertical restraints may have the same procompetitive use -- giving dealers the incentive to provide special services by addressing the free rider problem.

I recognize, of course, that some discounters may provide pre-sale services. A supplier, however, should be allowed to determine the level of services provided by its dealers in the aggregate. In the absence of vertical price restraints, a discounter might choose to provide some services, but fewer services or services of lower quality than its full-priced competitors. And many discounters will undoubtedly choose to provide no services at all. Eventually, the level of services in the market will erode. For that reason, many suppliers need a mechanism to insure that all of their dealers provide all of the services they seek to deliver to consumers.

The preservation of pre-sale services is important to the economy, particularly in the high technology area. Many of the important new products introduced by American manufacturers in recent years are technologically complex and require both pre-sale services and after-the-sale support. During the introductory marketing of a new product, when few potential buyers may be familiar with it, dealers must be able to explain the product's uses and features, demonstrate the product, and answer questions about it. In short, they must inform consumers fully about the product in order to sell it. But few would be willing to provide such services without restraints on free riding.[3] The use of vertical price restraints therefore may be necessary in some cases to bring an innovative new product to the market.

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[2] 433 U.S. 36 (1977).

[3] This is why dealers who provide pre-sale services predictably complain to manufacturers about free riders who do not. As discussed below, such conduct could give rise to an inference of conspiracy under the proposed legislation.

Vertical price restraints can also facilitate inter-brand competition by preventing free riding on promotional services. Suppliers who need point-of-sale and other marketing efforts by dealers to compete with other suppliers may impose vertical restraints to prevent free riding by dealers who fail to furnish promotional services. Such promotional services may include in-store displays or more intangible services. For example, the types of outlets that carry apparel or cosmetics brands often signal to consumers useful fashion or quality information. Department stores may convey such a message, and thereby provide a service to the manufacturer, simply by carrying a product. In such cases, vertical price restraints may preserve dealers' incentives to continue providing promotional efforts that foster inter-brand competition.[4]

Suppliers may also use vertical restraints to ensure that dealers provide retailing services that are valued by consumers but may be invisible to them at the time of purchase. These services affect the quality of the product as it is received by consumers and, therefore, the reputation of its manufacturer or distributor. For example, some products may require handling procedures to prevent latent damage. By guaranteeing higher margins to retailers through vertical restraints manufacturers who require that dealers provide a desired level of services as a condition for maintaining the supplier relationship[5] can provide an incentive to dealers to provide those services.

There is abundant evidence, both theoretical and empirical, that vertical price restraints can promote efficiency in distribution -- just as vertical non-price restraints do. Two studies prepared by Commission economists are particularly worthy of mention. One study found that the majority of observed uses of resale price maintenance occur in relatively unconcentrated markets and that the practice is often used by small firms with no market power and no ability to harm consumer welfare.[6] Because the ability to raise prices above the competitive level usually requires a highly concentrated market structure, this evidence suggests that vertical price restraints are commonly used to benefit consumers. A more recent study concluded that approximately 70 percent of litigated cases of vertical price restraints are consistent with attempts to prevent free riding or other erosion of dealer services and that only 15 percent of litigated cases had any anticompetitive potential.[7]

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[4] Manufacturers may sometimes be able to encourage these promotional efforts by providing promotional allowances or other direct payments to the dealers who provide the services, and some manufacturers indeed may be able to address the free rider problem in this way. But direct allowances may be a costlier or less effective method of confronting the problem, and I do not believe that manufacturers should be categorically precluded from using the vertical price restraint device.

[5] Of course, manufacturers must engage in some policing of dealers' services to offer a credible threat of termination of the supplier relationship.

I recognize, of course, that resale price maintenance may be an instrument for anticompetitive practices, such as when the practice is used to facilitate or police collusion at the manufacturer or dealer level.[8] It bears emphasis that I am not urging that vertical price restraints be made per se lawful. The question before your Committee is whether such restraints should be condemned automatically without examination of their effects. It is by now axiomatic that we only subject to automatic antitrust condemnation practices that by their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[9] As I have just noted, the empirical evidence suggests that the facilitation of collusion explains only a small fraction of the uses of resale price maintenance, even in litigated cases. I think it is self-evident that a practice that is far less likely to have anticompetitive than procompetitive effects should not be subject to automatic condemnation.[10]

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[6] T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence (1983).

[7] P. Ippolito, Resale Price Maintenance: Economic Evidence from Litigation (1988).

[8] See Posner, Antitrust Analysis and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 294 (1975)

[9] National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

[10] I recognize that the Supreme Court has thus far refused to evaluate vertical price agreements under the rule of reason, in spite of its recognition that vertical nonprice restraints should be so evaluated. Compare Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752 (1984), with Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). As I have noted, however, most antitrust and economics scholars agree that resale price maintenance can often serve procompetitive purposes. See, e.g., (continued...)

Finally, another important principle is at stake when we consider codifying special antitrust treatment for a particular practice. The antitrust laws have evolved over the years in line with the economic understanding of practices in the market. As our understanding of distributional practices has become more sophisticated, so has the courts' treatment of these practices. It is a tradition from which we have all benefitted. The courts must have the flexibility to interpret the antitrust laws in light of current economic learning. A statutory codification of the per se rule for resale price maintenance would deprive courts of that flexibility and would fix in place a rule that is likely to constrain technological innovation.

II. The Proposed Redefinition of Price Fixing Conspiracy in S. 865 Would Injure Consumers

S. 865 would broaden the definition of an unlawful price fixing conspiracy and thereby compound the detrimental effects of codifying the per se rule. The antitrust laws have traditionally permitted sellers to take unilateral action to restrict pricing decisions by downstream distributors. This has been the law of the land since the Supreme Court held in United States v. Colgate & Co.[11] that a seller acting alone is free to "exercise his own independent discretion as to parties with whom he will deal." Under Colgate, sellers have been able to terminate dealers who do not adhere to announced price schedules, so long as there is no agreement to fix resale prices. Colgate was reaffirmed by the

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[10] (...continued) Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265 (1988); Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J.L. & Econ. 363 (1985); Hovenkamp, Vertical Restrictions and Monopoly Power, 64 Boston U. L. Rev. 521 (1984); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6 (1981); R. Bork, The Antitrust Paradox 280-98 (1978); Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. Chi. L. Rev. 1 (1977); Telser, Why Should Manufacturers Want Fair Trade?, 3 J. Law & Econ. 86 (1960). Indeed, this was recognized by the Supreme Court in Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515, 1521 (1988), where the Court recognized that suppliers often use vertical price restraints "to ensure adequate services."

[11] 250 U.S. 300, 307 (1919).

Supreme Court in Monsanto Co. v. Spray-Rite Corp.,[12] and more recently in Business Electronics Corp. v. Sharp Electronics Corp.[13] S. 865 would effectively overrule this long-standing doctrine and create an inference of an unlawful conspiracy merely because a seller had terminated a discounting dealer after receiving complaints from full-service dealers.

Before addressing the substance of this proposed amendment, I wish to dispel a misconception concerning the effects of the Monsanto decision that has been repeated in hearings on prior bills that, like this bill, had sought to overrule the case by redefining price fixing conspiracies. Again and again we have heard the refrain that Monsanto has given manufacturers a license to fix prices and has thereby grievously injured discounting retailers. In hearings before this Committee in April of 1987, for example, we heard from the National Mass Retailing Institute that resale price maintenance "adds to retail business failure." Another representative of discounters stated that unless legislation were enacted to overrule Monsanto immediately, "retail level competition [would be] in real danger." And another discounter went so far as to say that the "prospect we face, if the proposed legislation is not enacted, is the elimination of price competition as we have known it for decades."

Let us now consider the facts. In its 1987 testimony, the National Mass Retailing Institute described the growth of the discount retail industry over the past two decades as "explosive." The evidence supports this contention. According to a June 1987 report in Discount Merchandiser, in 1985, the year after Monsanto was decided, discount store sales rose by 9.2 percent, from $62.2 billion to $67.9 billion. The following year, according to the same report, they rose by another 6.3 percent, to $72.2 billion. The most recent data are based on 1987 earnings reports, and they are truly phenomenal. On August 8, 1988, Women's Wear Daily reviewed the 1987 financial results of 46 publicly-owned retail companies and found that discount stores outperformed all other sectors of the retail business. While reporting an "industry downturn," the paper noted that sales by the discount group increased 25.2 percent over the preceding year and that profits increased an even-greater 36 percent. The paper further reported that "[a]lthough off-price store margins might be expected to be low due to discount prices, this group came up with higher margins than most conventional retailers." On July 4, 1988, Discount Store News reported that despite a major softening in the apparel business, "most off-price apparel chains recorded healthy sales gains during 1987."

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[12] 465 U.S. 752 (1984).

[13] 108 S. Ct. 1515 (1988).

The star performers noted by the two reports include familiar names, such as Wal-Mart Stores, K-Mart, Dress Barn, Kids-R-Us, and Burlington Coat Factory.

If we look at the records of some of the players in the discount sector, what we find hardly bears out the dire predictions of Monsanto's critics. From 1980 to 1987, Wal-Mart's sales went up nearly tenfold, from $1.64 billion to $15.97 billion. The firm's profits during the same period increased from $55.7 million to $628 million. During the same period, Dress Barn's sales also rose by more than tenfold, from $18 million to $205 million and the firm's profits shot up from $868,000 to $25 million. The story for that period is similar at Burlington Coat Factory, which recorded sales gains of more than $425 million (or more than 800 percent) and increased its annual profits by $17 million (or nearly 600 percent). At Circuit City, sales increased eightfold, from $120 million to over $1 billion, and profits increased from under $2 million to over $36 million. A more established discounter, K-Mart, nearly doubled its sales during the same period, from $14.2 billion to $25.63 billion, and more than doubled its profits, from $260 million to $692 million.

In spite of this record of growth, we have again heard the same tired refrain concerning the threat that Monsanto and now Sharp pose to the health of the discount store industry. I suggest that you treat it with a large measure of skepticism. The discount sector is alive and quite well, and pleas that discounters cannot survive unless they are given license to free ride on the efforts of full price merchants are simply not true. Of course, since consumers are harmed when discounters free ride on the efforts of other retailers, we would not want them to survive if they could only do so by free riding.

Let us now consider what S. 865 would do to conspiracy law. At first blush, this aspect of the bill seems rather innocuous. It requires a court in a vertical price restraint case to find that there is "sufficient evidence" from which a trier of fact could infer the existence of a conspiracy to set prices before sending a case to the jury. This requirement, on its face, seems consistent with the holding of Sharp, and for that reason would seem unnecessary, though unobjectionable. But S. 865 is anything but consistent with the Supreme Court's teachings. The "sufficient evidence" requirement is completely undermined by the bill's definition of the term. Under that definition, a case would be submitted to the jury whenever evidence would permit the jury to conclude that the supplier's receipt of a complaint concerning the discounter had been "the major contributing cause" of the plaintiffs' termination. Thus, although the bill appears to require the existence of a contract or conspiracy to set resale prices, proposed section 8(a)(1)(B) negates that requirement by providing that such a contract or conspiracy can be deemed to exist whenever a termination of a discounter follows the supplier's receipt of a complaint about price cutting from a competitor of the discounter.

The bill thus fails to recognize that suppliers and dealers may have a common interest in promoting various distribution services, and that suppliers may act in ways that benefit dealers without any agreement or conscious commitment to a joint course of action. Suppliers often have an interest in eliminating discounting dealers because discounters fail to provide the support services that the suppliers want their customers to receive and, by free riding on competing dealers who do provide such services, jeopardize the suppliers' product marketing plans. A decision to cut off a price cutter following a communication from a competing dealer is likely to serve the interests of the supplier as well as those of the complaining dealer. Yet a supplier would now risk antitrust liability whenever it terminates a dealer following the receipt of a complaint from another dealer. A jury would be free to find that such a complaint, by alerting the supplier to the discounting, was quite literally "the major contributing cause" of the termination. And as the Supreme Court observed in the Sharp case earlier this year, "[i]n the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services" rather than to punish price cutting.[14]

In addition, the bill erroneously equates agreements to terminate a free riding dealer with price fixing and is, for that reason, objectionable. As the Supreme Court observed in Sharp, there is "no support for the proposition that vertical price restraints generally underlie agreements to terminate a price cutter."[15]

I have another concern about this legislation. Enactment of this bill could induce inefficient changes in market structure. Facing the threat of treble damages liability for procompetitive conduct and uncertain whether they can legally terminate a free riding dealer, some manufacturers may decide to integrate downward to the retail level to ensure that consumers receive the necessary level of services, without incurring the risk of free riding. This probably would be less efficient than current forms of distribution. Manufacturers who sell through independent dealers presumably do so because they find this form of distribution to be more efficient than downward integration. Yet, the costs imposed by this legislation may make it costlier to continue to distribute through independent dealers than to integrate vertically. Ironically, this effect would harm the very dealers the bill purports to protect.

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[14] 108 S. Ct. at 1521.

[15] Id. at 1523.

Conclusion

I urge you to consider the full implications of S. 865 for the competitive process. Enactment of this legislation is likely to stifle procompetitive conduct and to harm not only American manufacturers, but also the consumers and potentially even the very dealers the legislation is intended to benefit.

Sincerely,

Daniel Oliver
Chairman

STATEMENT OF THE BUSINESS ROUNDTABLE
WITH RESPECT TO
"THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989"
(S. 865)

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 1, 1989

Statement of The Business Roundtable With Respect to S. 865

INTRODUCTION

The Business Roundtable is an association of about 200 major companies, represented by their chief executive officers. The companies are widely dispersed by geographic location and type of business, and they are substantial producers and purchasers of goods and services. As such, these companies are vitally concerned about the effectiveness and the reasonableness of the antitrust laws.

This Statement will not discuss S. 865 in great detail. An extensive legislative record on a similar bill, S. 430, was created in the 100th Congress. To the extent that S. 865 parallels S. 430, the arguments have already been explored -- and will undoubtedly be explored again in the testimony of other witnesses. This Statement will only address one very significant difference between S. 865 and S. 430: namely, the explicit language in S. 865 that would overrule the Supreme Court's 1988 Sharp decision. 1/ This is a very serious mistake, and the Roundtable cannot support the bill.

1/ Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988).

In order to understand why this matter is so serious it is necessary for the Committee to understand something about the real world of distribution. This Statement will attempt to explain some basic facts about that world, without reference to esoteric jargon.

THE BILL WOULD CONDEMN PEOPLE WHO ARE ENTIRELY INNOCENT OF PRICE-FIXING

Experience has shown that the vast majority of the producers in the United States have no interest whatever in maintaining resale prices. Even when resale-price agreements were perfectly legal under so-called "Fair Trade" laws, only a small fraction of consumer goods were subject to Fair Trade and discount stores began their explosive growth. Under S. 865, however, manufacturers who are totally indifferent to resale prices would still be subject to *per se* liability for antitrust treble damages.

How could this be so? Consider the case of a manufacturer who distributes a line of goods simultaneously both through so-called "discount" and through "full-service" stores. Our everyday experience as consumers demonstrates that this is a common situation. The full-service stores may be located in more accessible, high-rent neighborhoods; they may have relatively larger and better trained sales staffs; they may have more comfortable showrooms in which customers may browse; they may have more flexible credit and return policies, and so on. All of these amenities are expensive to provide, and therefore the full-service outlets normally will charge higher prices than the discount outlets. This is simply an economic fact of life, and it will happen even if the manufacturer has never discussed resale prices with anyone.

If the full-service outlets do not generally attract the same kinds of customer as the discount outlets, or if there is plenty of business to go around, the two parallel methods of distribution can comfortably exist side-by-side. Often, however, there will be evidence of "free-riding": that is, a significant number of customers will browse and obtain product information in the comfortable surroundings of the full-service store and actually purchase the goods for a lower price at the discount stores. Even without free-riding, diversions of customers to the discount stores may be so large that the full-service store is reluctant to handle the goods. Or the availability of the product at deep discounts may undercut the quality image that the full-service store wants to maintain. There are a number of reasons why some full-service outlets will become dissatisfied with existing arrangements and conclude that it is no longer economic to handle a particular product in competition with lower-priced discount stores.

What will happen? Under our free-market system, retailers are not obliged to carry goods that they do not want to carry, and manufacturers are not obliged to sell to people that they do not want as customers, so the parties are not locked into the status quo. There are a number of alternative possibilities.

1. The full-service outlet may simply discontinue the manufacturer's line at the earliest opportunity. This does shut off an alternative source for consumers, but it would be entirely legal today and no one proposes to make it illegal.

2. The full-service outlet may foolishly attempt to persuade the manufacturer to impose resale-price maintenance on the discount competitors. Any agreement of this kind would be *per se* illegal under current law, that includes the *Sharp* case, and no legislation is necessary to condemn such a pernicious effort.

3. The full-service outlet may attempt to persuade the manufacturer to impose various performance standards on all of its dealers, in order to reduce the cost advantages that the discounters enjoy. For example, the manufacturer might require that products be displayed in a certain way or that certain point-of-sale information be available. If discounters did not want to comply, they could be terminated. Agreements of this kind would be judged under the rule-of-reason, and would in all probability be legal unless the manufacturer or the full-service outlet had a dominant position. Such standards might be difficult to articulate and expensive to enforce,

however, or the manufacturer may be reluctant to enforce sweeping obligations to accommodate a local problem. Standards for dealer performance are therefore not necessarily either a realistic or a pro-consumer solution.

4. The full-service outlet may attempt to negotiate an exclusive dealing arrangement, which would require the manufacturer to terminate all competing full-service stores as well as discount stores. This arrangement is arguably the most restrictive alternative of all, but (as even the dissent in Sharp acknowledges) it would be subject to the rule-of-reason and probably legal unless there were high market shares. The reason is that the availability of competing lines of goods from other manufacturers (interbrand competition) will discipline the prices of the outlet with the exclusive rights.

5. The full-service outlet may go to the manufacturer and say something like: "We cannot continue to sell your products profitably in competition with discount stores and you will have to choose between them and us." This is an eminently reasonable request, and presumably the manufacturer's choice will depend on the relative importance of the two kinds of stores in its marketing strategies. Notice that under this scenario the manufacturer may have no interest whatever in resale prices as such; it just wants to sell to the best available outlets for its purposes, in circumstances where it is no longer possible to sell to everyone. Notice too that

this alternative may restrict retail competition far less than the exclusive-dealing alternative described in paragraph 4, which is probably legal.

Alternative 5 basically describes the kind of situation that existed in the _Sharp_ case. A retailer informs the manufacturer about the difficulty of meeting a discounter's prices with its higher-cost operation, and presents a "pick him or me" ultimatum. The 6-2 Supreme Court majority in _Sharp_ held quite logically that this scenario should be judged under the rule of reason (as an even more restrictive, exclusive deal would be) unless there is _some_ evidence that the manufacturer and the surviving full-service dealer have some kind of an understanding on price. The Supreme Court's opinion in _Sharp_ did not specifically spell out what evidence is required, but it is noteworthy that the opinion affirmed a Court of Appeals opinion that had stated it was sufficient for liability if the manufacturer and the surviving dealer "expressly or impliedly agree to set its prices at some level, though not a specific one." 2/ In other words, a resale-price agreement would not be impossible to prove. But, without some evidence of an understanding on resale prices, _per se_ condemnation is inappropriate.

2/ Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212, 1218 (5th Cir. 1986).

S. 865 is avowedly intended to overturn the sensible result in the _Sharp_ case. If a full-service dealer can no longer profitably compete with a discount dealer, the bill would make it _per se_ illegal for the manufacturer to agree to continue that dealer in preference to the discount dealer, despite the fact that the manufacturer has expressed no interest in resale prices and despite the fact that the manufacturer has no obligation initially to include discount dealers in any of its distribution networks. If this legislation were to pass, an entirely innocent manufacturer would, as a practical matter, risk treble-damage liability any time it changed a distribution system.

THE BILL WOULD NOT HELP CONSUMERS

What would S. 865 ultimately do for consumers? If the bill were to pass, there would in the short term undoubtedly be a lot more treble-damage litigation, a lot more confusion, and a lot more plaintiff recoveries. But, consumers will not be helped at all. In the long run, people will learn how to avoid the burdens of the bill in perfectly legal ways that are more restrictive than current practice.

It is particularly naive to suppose that any law can ensure the simultaneous availability at all times of all brands of goods side-by-side in full-service and discount stores. If full-service stores can no longer handle goods profitably in competition with discount stores, they cannot be compelled to do so. And some manufacturers will always prefer to deal with full-service outlets if they are forced to make a choice, so discount stores can never be guaranteed access to all products. 3/ What S. 865 would do, however, is *increase* the degree of stratification between the two kinds of stores because *it would be very dangerous for a manufacturer to experiment with a broad distribution system and later change its mind*.

It is perfectly legal for a manufacturer to restrict sales outlets initially or on the expiration of its manufacturer/dealer agreements. S. 865 will not change that. A manufacturer will be much less willing to take a chance on a discount outlet, however, if later termination of that outlet will stimulate a treble-damage lawsuit. Similarly, a full-service store with bargaining power is much more likely to insist on some kind of exclusive representation at the outset if it is *per se* illegal to obtain it later on.

Discount stores are thriving today and there is no evidence that recent judicial decisions have threatened their

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3/ Discount stores have never had guaranteed access to all lines of goods, but they have prospered nonetheless because there always are plenty of manufacturers that are pleased to do business with them.

established position. In the long run, a modification of the Sharp case would restrict, not expand, the availability of discounted goods. S. 865 will have effects that are precisely opposite to those that its sponsors presumably intend. It will help lawyers a lot, but it will not help consumers at all.

CONCLUSION

The Business Roundtable cannot support S. 865 or any other bill that would overturn the Supreme Court's decision in Sharp.

LOWER COURT
APPLICATIONS OF MONSANTO
1984 - 1989

MONSANTO TEST MET BY PLAINTIFF - SUMMARY DISPOSITION (SUMMARY JUDGMENT, DIRECTED VERDICT OR JUDGMENT N.O.V.) FOR DEFENDANT DENIED.

1. *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988) (exclusive dealing, conspiracy - *Monsanto* cited - direct evidence that termination of nurse anesthetist resulted from threats by anesthesiologists sufficient to establish conspiracy; *Copperweld* defense rejected on ground that anesthesiologists were independent contractors pursuing their own economic interests when they pressured hospital to terminate plaintiff)

2. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989) (group boycott, bid rigging - *Monsanto* cited - circumstantial evidence of market allocation agreement tended to exclude possibility of independent action by motion picture distributors)

3. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987) (group boycott, monopolization - Monsanto cited - inference of conspiracy drawn from fact that GMC had taken steps toward granting plaintiff a Buick franchise but denied the application after receiving threats from existing dealers).

4. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1728 (1988) (RPM - *Monsanto* cited - reversal of judgment n.o.v.; fact that dealer raised prices in response to acts of harassment (i.e., threats to dealer to mix up orders, omission of dealer from advertising) by manufacturer constituted sufficient evidence of RPM agreement, even though acts of harassment occurred after dealer raised prices).

5. *Tunis Brothers Co. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1013 (1988) (refusal to deal - *Monsanto* - cited - inference of conspiracy drawn from evidence that manufacturer had a financial interest in competitor of terminated dealership, that its employees tricked terminated dealer into resigning and caused another application for the dealership to be rejected by inserting false financial information).

6. Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc. 818 F.2d 1530, (11th Cir. 1987) (RPM - Monsanto applied - inference of conspiracy drawn from fact that manufacturer advised complaining distributor that corrective action had been taken regarding the discounting distributor; however, decision based on finding that "suggested price lists and schedules of discounts" in distributorship agreement constituted express RPM agreement).

7. Instructional Systems Development Corp. v. Aetna Casualty and Surety Company, 817 F.2d 639 (10th Cir. 1987) (market division, monopolization - Monsanto cited - trademark licensing agreement extended beyond marketing arrangements reasonably necessary to effectuate license,thereby raising an issue of fact as to whether defendants' actions were undertaken pursuant to an unlawful agreement to drive plaintiff out of the driving simulator market)

8. Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986), aff'd, 108 S.Ct. 1515 (1988) (RPM - Monsanto applied - verdict for plaintiff reversed, based on erroneous jury instruction; agreement between manufacturer and a dealer to terminate another dealer because of that dealer's price cutting is not per se illegal, unless the complaining dealer agrees to set its prices at some level; remanded for new trial).

9. Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985) (RPM - Monsanto cited - evidence sufficient to support jury finding that defendant sales representative, who also owned retail outlets, was acting for his own benefit and not as manufacturer's agent when he recommended termination of one of his retail competitors, pursuant to manufacturer's policy against sales to retailers with "discount image"; no error in jury instruction which permitted finding of violation on the basis of a "price-related" conspiracy).

10. Park v. El Paso Board of Realtors, 764 F.2d 367 (5th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) (group boycott, price fixing. - Monsanto cited - jury question as to conspiracy raised by evidence that defendant real estate brokers had disparaged plaintiff (broker), had attempted to discriminate against him in the division of commissions and had interfered with his attempts to charge flat fees).

11. Terry's Floor Fashions v. Burlington Industries, Inc., 763 F.2d 604 (4th Cir. 1985) (group boycott - Monsanto cited - summary judgment on conspiracy issue improper where evidence showed that carpet manufacturer offered better prices to retail competitor of plaintiff than to plaintiff in exchange for minimum sales guarantee and that manufacturer terminated

plaintiff after receiving threats from preferred dealer regarding plaintiff's "bootlegging" activities; however, summary judgment for defendant affirmed, based on absence of proof of anticompetitive effect.

12. Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3d Cir. 1985) (group boycott, monopolization - Monsanto cited - inference of conspiracy could be drawn from fact that defendant distributor repudiated agreement to sell to plaintiff retailer after receiving complaints from competing retailer and evidence offered by plaintiff which challenged each articulated reason for defendants' refusal to deal with him).

13. Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985) (RPM - Monsanto cited - verdict for plaintiff; on appeal, held that district court did not err in failing to give jury instruction which spelled out Monsanto rule, since jury was instructed that mere similarity of conduct or discussion by the defendants of common aims and interests "does not necessarily establish proof of...conspiracy").

14. World of Sleep, Inc. v. La-Z Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985), cert. denied, 474 U.S. 823 (1985) (R-P - Monsanto cited - direct evidence that manufacturer attempted to coerce retailer into "keep[ing] his prices up" by using credit hold and future purchase restrictions sufficient to get claim against manufacturer to jury under per se theory; judgment for retail defendants affirmed, based on insufficiency of admissible evidence of conspiracy).

15. North Central Watt Count v. Watt Count Engineering Systems, 678 F. Supp. 1305 (M.D.Tenn. 1988) (refusal to deal - Monsanto cited - evidence sufficient to raise jury issue as to whether manufacturer's refusal to deal with plaintiff dealer was done at request or demand of a down-stream competitor of plaintiff, in order to eliminate intra-brand price competition).

16. Malley-Duff & Associates v. Crown Life Insurance Co., 734 F.2d 133 (3d Cir. 1984), cert. denied, 469 U.S. 1072 (1984) (group boycott - Monsanto cited - reversal of summary judgment; terminated insurance agency offered direct evidence of predatory agreement among competing agencies and senior vice president of insurance carrier, as well as circumstantial evidence that carrier, through its vice president, had imposed unreasonable quotas on plaintiff agency and made substantial loans to competing agency in which vice president had an interest)

17. Black Gold Ltd. v. Rockwool Industries, Inc., 732 F.2d 779 (10th Cir. 1984), cert. denied, 469 U.S. 854 (1984) (tying - Monsanto cited - in denying defendant's petition for

rehearing, based on Monsanto, court holds that evidence that manufacturer used high demand for its blown wool as leverage to obtain acquiescence in tying arrangement was sufficient to survive motion for directed verdict)

18. Sweeney v. Athens Regional Medical Center, [1989] Antitrust & Trade Reg. Rep. (BNA) Vol. 56, p. 527 (M.D. Ga. 1989) refusal to deal - Monsanto cited - Complaints by doctors against nurse mid-wife, pressure to refuse to deal with plaintiff and joint meetings, letters, etc. sufficient evidence for jury to conclude at least some defendants conspired to restrain trade)

19. Precision Piping & Instruments, Inc. v. E. I. duPont de Nemours and Co., 1989-1 Trade Cas. (CCH) §68,531 (S.D.W.Va. 1989) (refusal to deal - Monsanto cited evidence offered by pipefitting contractor that had been expelled from trade association tended to exclude possibility of unilateral action; evidence indicated that each association member had refused to deal with plaintiff and that defendants had communicated among themselves regarding possible boycott or expulsion)

20. North Central Watt Count, Inc. v. Watt Count Engineering Systems, 1988-1 Trade Cas. (CCH) §67,940 (M.D. Tenn. 1988) (refusal to deal - Monsanto cited - finding without elaboration that plaintiff's circumstantial evidence of refusal by competing supplier to deal and enforcement by manufacturer of exclusive territories tended to exclude possibility of unilateral action)

21. Arnold Pontiac - GMC, Inc. v. General Motors Corp., 1988-2 Trade Cas. (CCH) ¶68,343 (W.D. Pa. 1988) (group boycott - Monsanto cited - evidence of agreement between manufacturer and other dealers tended to exclude possibility that manufacturer acted unilaterally in denying franchise to plaintiff dealer)

22. Shah v. Memorial Hospital, 1988-2 Trade Cas. (CCH) ¶68,199 (W.D. Va. 1988) (group boycott - Monsanto cited - despite plausible reasons for hospital's denial of staff privileges, circumstantial evidence sufficient to support inference of conspiracy)

23. Johnson v. Blue Cross/Blue Shield, 677 F.Supp. 1112 (D.N.M. 1987) (group boycott - Monsanto cited - circumstantial evidence of agreement between physicians and insurer to deny chiropractic coverage sufficient to preclude summary judgment; inference could also be drawn from fact that insurer acted against its own economic interest in refusing to provide coverage).

24. Minpeco, S.A. v. Conticommodity Services, Inc., 673 F.Supp. 684 (S.D.N.Y. 1987) (price fixing - Monsanto cited - evidence offered by plaintiff sufficient to raise genuine issue of material fact as to whether three brokerage firms and two individual traders knowingly participated in conspiracy to manipulate silver prices).

25. Power Conversion, Inc. v. Saft America, Inc., 672 F. Supp. 224 (D. Md. 1987) (price fixing - Monsanto cited - Monsanto test satisfied with direct testimonial evidence of bid-rigging and predatory pricing conspiracy)

26. Wilk v. American Medical Association, 671 F. Supp. 1465 (N.D. Ill. 1987) (group boycott - Monsanto cited - endorsement by physicians' group of AMA resolution condemning chiropractic as unscientific sufficient to support inference of conspiracy; claims against hospital accreditation commission dismissed based on failure to show concerted action; in dismissing claims against members of accreditation commission, court rejected argument that mere membership, without affirmative ratification, made each member liable for acts of commission)

27. Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 663 F. Supp. 1360 (D. Kan. 1987) (group boycott - Monsanto cited - plaintiff's direct evidence that BCBSK agreed to terminate plaintiff hospital and HMO in exchange for agreement by competing hospitals to accept reduced maximum allowable payments sufficient to withstand summary judgment motion; defendant's counterclaim rejected on ground that consciously parallel conduct of two clinics in cancelling their contracts with defendant HMO was insufficient to support inference of conspiracy)

28. Brokers' Assistant, Inc. v. Williams Real Estate Co., 646 F.Supp. 1110 (S.D.N.Y. 1986) (group boycott - Monsanto cited - summary judgment precluded by disputed issues of fact, including evidence as to conversations in which defendant real estate broker allegedly admitted that defendants had collectively decided not to provide listing information to plaintiff real estate brokerage service).

29. Machine Maintenance & Equipment Co. v. Cooper Industries, Inc., 634 F.Supp. 367 (E.D.Mo. 1986) (RPM - Monsanto cited - finding without elaboration that evidence of an agreement between defendant and plaintiff's two former salesmen to maintain resale prices by terminating plaintiff and establishing salesmen as new distributor sufficient to preclude summary judgment).

30. E. W. Kalkin, Inc. v. Fieldcrest Mills, Inc., 1985-2 Trade Cas. (CCH) ¶66,742 (S.D.N.Y. 1985) (RPM - Monsanto cited - renewed motion for summary judgment denied, based on determination that Monsanto did not change the law of the circuit).

31. Burlington Coat Factory Warehouse v. Belk Brothers Co., 621 F. Supp. 224 (S.D.N.Y. 1985) (RPM - Monsanto cited - summary judgment denied with respect to terminated dealers claim against competing dealer and one manufacturer (Jantzen) based on evidence that manufacturer's distribution policies were a non-issue prior to receipt of threats by plaintiff's non-discounting competitor and that these policies were not applied to less attractive stores in areas where the complaining dealer did not retail; summary judgment granted with respect to claim of conspiracy between competing dealers, based on plaintiff's failure to offer anything more than "conjecture and conclusory allegations").

32. Marco Holding Co. v. Lear Siegler, Inc., 606 F.Supp. 204 (N.D.Ill. 1985) (RPM - Monsanto cited - Monsanto test met by plaintiff's evidence of vehement complaints and threats about price-cutting distributor by competing distributors, the fact that the termination occurred shortly after the receipt of such threats and the different discount price schedules offered by the manufacturer and the terminated distributor with respect to sales to the same distributors).

33. James Julian, Inc. v. Raytheon Co., 593 F. Supp. 915 (D. Del. 1984) (group boycott, labor exemption - Monsanto cited - evidence that employer met with union to discuss plaintiff subcontractor and that employer terminated plaintiff "as a concession to achieve labor peace based on the threats of a picket" sufficient to raise jury issue as to conspiracy issue).

34. American Dermatologists' Medical Group, Inc. v. Collagen Corp., 595 F. Supp. 79 (N.D. Ill. 1984) (refusal to deal - Monsanto cited - physician's claim against implant manufacturer for refusing to deal with him found sufficient to survive summary judgment; plaintiff's evidence cast doubt on defendant's stated business reasons for its actions, showed that manufacturer adopted advertising restrictions in response to pressure from physician association and established that the association's president had a financial interest in the manufacturer).

MANUFACTURING
CREATES
AMERICA'S
STRENGTH

STATEMENT ON
THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989
S. 865

On behalf of the
NATIONAL ASSOCIATION OF MANUFACTURERS

To the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 1, 1989

National Association of Manufacturers
1331 Pennsylvania Avenue, NW, Suite 1500 — North Lobby
Washington, DC 20004-1703 (202) 637-3000

EXECUTIVE SUMMARY

The National Association of Manufacturers strongly opposes enactment of The Consumer Protection Against Price-Fixing Act of 1989, S. 865, because the changes it proposes to the antitrust laws will hamper the ability of manufacturers to enforce standards of quality and performance by their dealers and distributors to the detriment of consumers.

By easing the rules of evidence in alleged price fixing cases, the legislation would transform breach of contract disputes caused by dealer termination into unwarranted antitrust challenges.

The NAM position is not intended to counteract the recent trend toward discounting at the retail level. Rather, it centers on the ability of manufacturers to end relationships with dealers and distributors that do not perform adequately. Under the terms of S. 865, a manufacturer would become exposed to a charge of price fixing by terminating a dealer after receiving a complaint merely inferring problems of price competition from a rival--even if the termination was caused by failure to adhere to perfectly lawful obligations.

The intensity of interbrand competition--which is company against company, model against model--often requires manufacturers to ensure that their dealers and distributors offer better services to customers, participation in promotional arrangements, and/or sales forces trained in the nuances of explaining the benefits of the product over another. A breakdown in this system could result in a loss of sales for both the manufacturer and remaining dealers, as well as a loss of choice, services, and product information to the consumer.

Under current law, discounting is proliferating and there is no evidence to indicate that this trend in retailing will decrease. In overturning major Supreme Court rulings that deal with rules of evidence, the distinction between legitimate terminations for nonprice reasons versus illegal price fixing agreements, and independent as opposed to concerted activity, however, S.865 would interfere with the ability of manufacturers to enforce lawful contractual obligations, often at the expense of the consumer.

Small manufacturers are especially dependent on quality dealer and distributor networks and would be adversely affected if they are unable to rid themselves of dealers not meeting performance requirements, which again would be to the detriment of consumers.

STATEMENT ON
THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1989
S. 865

On behalf of the
NATIONAL ASSOCIATION OF MANUFACTURERS

To the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 1, 1989

Mr. Chairman, members of the Committee, the National Association of Manufacturers thanks you for this opportunity to submit this statement on The Consumer Protection Against Price-Fixing Act of 1989, S. 865.

While the NAM strongly opposes enactment of S. 865, we would like to make clear from the beginning that the association in no way supports price fixing, nor do we want to hinder the dramatic growth of the discount segment of the retail industry. The NAM favors vigorous competition as a necessary ingredient for a healthy free enterprise system.

To understand NAM's concerns about S. 865, some background about business practices and their treatment under the antitrust laws is helpful. NAM's members both manufacture a wide variety of products and are engaged in the business of reselling products manufactured by others. The vast majority of NAM's members allow their distributors or dealers (who may also be NAM members) to sell anywhere, to anyone and at any price. Many distributors and dealers of these products, however, have contractual obligations with their respective suppliers to perform necessary repairs, honor warranties, and provide other customer services, as well as to actively promote the resale of products or services to retail customers.

In addition, some distributors and dealers may have obligated themselves to resell products from specific locations, or within certain contractually defined territories, or may be authorized by their suppliers only to sell to certain classes of customers, such as wholesale or retail customers. As you know, all of these restrictions on distributors and dealers imposed by contract with their suppliers are called "nonprice vertical restraints." Since the Supreme Court's 1977 decision in Continental T.V., Inc. v. GTE-Sylvania, 433 U.S. 36, 50-51 (1977), nonprice vertical restraints have been subject to antitrust scrutiny under the so-called "rule of reason," and are found to be reasonable (and therefore lawful) far more often than not.

Finally, if for some marketing reason resale prices are important to a supplier, it can lawfully announce resale prices in advance and refuse to deal with those who fail to comply, and a distributor or dealer is free to unilaterally acquiesce in its supplier's demand in order to avoid termination. That rule, which remains the law today, was first announced by the Supreme Court in 1919 in United States v. Colgate & Co., 250 U.S. 300,307 (1919).

There can be a very thin line, however, between a supplier's lawful unilateral refusal to deal because of concerns about resale prices and an agreement between a supplier and its dealers to resell products only at certain prices or price levels. The former unilateral conduct is lawful under Colgate. In contrast, an express or implied agreement between a supplier and its dealers to fix resale prices or price levels has long been considered a per se violation of Section 1 of the Sherman Act (i.e., unlawful without actual proof of anticompetitive effect and irrespective of any business justification). Resale price maintenance agreements have been per se unlawful since the Supreme Court's decision in Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911), and remain so today.

The distinction between nonprice vertical restraints (properly judged under the "rule of reason" and usually found to be lawful) and a per se unlawful resale price maintenance agreement is more clear-cut. Nevertheless, there is a real danger in litigation that lawful nonprice vertical restraints inadvertently can be condemned as per se unlawful vertical price fixing, especially in jury trials. By way of illustration, many dealers are required by their suppliers to provide some level of service to retail customers. A dealer's obligation to provide such services is usually beneficial to consumers and, for that reason, perfectly lawful. Yet when a supplier terminates a dealer for failure to provide customer services, the supplier can be and often is accused of attempting to control the terminated dealer's resale prices. Even if a manufacturer terminates a dealer for failure to provide contractually-required customer services, the manufacturer exposes itself to what the Supreme

Court has characterized as a "highly plausible" claim that the real motivation was to terminate a price cutter. Business Electronics Corp. v. Sharp Electronics Corp., 1988-1 Trade Case. (CCH)¶67, 482 at 58,022 (1988).

In Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), a unanimous Supreme Court defined the minimum standard of proof required to establish a per se unlawful resale price maintenance conspiracy, in order to guard against the danger that lawful unilateral or vertical conduct is not confused with, and inadvertently condemned as, per se unlawful vertical price fixing. Specifically, the Court held that a per se unlawful conspiracy to fix resale prices cannot be inferred solely from the existence of dealer complaints about a rival dealer's discounting, coupled with the price cutting dealer's termination, following or "in response to" such complaints. Id. at 759. Rather, "something more" is required before a per se unlawful vertical price fixing conspiracy can be inferred.

The "something more" required to infer an illegal conspiracy can be direct or circumstantial. In the Monsanto case itself, the Court held that a conspiracy was properly established by a few communications between the manufacturer and its distributors evidencing an implied agreement to maintain resale price levels. Thus, the Supreme Court affirmed a $10.5 million dollar treble damage award for the terminated distributor. Since Monsanto was decided in 1984, a substantial number of plaintiffs (including those in Monsanto and Sharp) have been successful in establishing the "something more" required to submit the conspiracy issue to a jury.

NAM's principal objection to S. 865 is that it effectively overrules the Monsanto decision, thereby subjecting ambiguous or even perfectly lawful conduct to the risk of per se condemnation as vertical price fixing. By its terms, S. 865 appears to mandate an "inference" that a supplier has engaged in a per se unlawful conspiracy to fix resale prices where: (1) a supplier receives from one dealer a communication regarding price competition by a rival dealer, and (2) "because of" the communication, the supplier terminates or refuses to supply some or all goods or services requested by the dealer. S. 865 further states that a termination or refusal to supply is "because of" a communication about price competition if such communication is "the major contributing cause" of the supplier's subsequent refusal to supply. Thus, S. 865 compels an inference of per se unlawful vertical price fixing, based upon the same legally ambiguous or lawful conduct that the Supreme Court unanimously rejected without "something more" in Monsanto. As a result, S. 865 seriously erodes the Supreme Court's prior decisions in Colgate and Sylvania and thereby makes lawful conduct per se unlawful.

To understand how S. 865 would work, let's examine a hypothetical, first under current law and then under the terms of S. 865. Suppose, as is usually the case in actual business practice, a supplier does not attempt to control its dealer's resale prices in any way. However, the supplier assigns its dealer an "exclusive territory," within which each dealer has sole responsibility for promoting sales. Now, suppose the manufacturer decides to terminate one of its dealers for repeated sales outside the dealer's assigned territory. Finally, suppose the manufacturer learned about the terminated dealer's territorial encroachment from another dealer.

Under current law, a court could and probably should grant summary judgment for the defendant with respect to the conspiracy allegation. True, there are complaints from other dealers about the terminated dealer, which might be interpreted as complaints about price competition. But while the termination was, indeed, "because of" those dealer complaints, although not because of any vertical price fixing scheme, the complaints nevertheless caused the manufacturer to investigate and ultimately terminate the plaintiff for lawful reasons.

Now, let's examine a complaint by one dealer to its supplier about sales in its exclusive territory by another dealer under the terms of S. 865. Is a complaint by one dealer about territorial encroachment by a rival dealer "an express or implied request or demand...that the seller take steps to curtail or eliminate price competition"? Probably so, even if the complaining dealer says nothing about prices. After all, if the manufacturer tells one dealer to stop encroaching in another dealer's exclusive territory "or else," that will totally eliminate intrabrand price competition. As the Supreme Court pointed out in the _Sharp_ case, "all vertical restraints, including exclusive territory agreements held not to be _per se_ illegal...have the potential to allow dealers to increase 'prices' and can be characterized to achieve just that." Sharp, supra at 58,022. Thus, S. 865 would draw all "him or me" ultimatums into the realm of price fixing. This is the kind of activity that manufacturers have no control over, and subjecting them to liability because of competitive practices of distributors would be unfair, unreasonable, and anticompetitive.

Let's take another hypothetical, where there is no real restraint involved at all--just a requirement that dealers provide a specified level of service to customers. Could the trier of fact reasonably conclude that one dealer's complaint about another dealer's failure to provide adequate levels of service was a communication about price competition? You can argue to the contrary. However, as the Court stated in the Sharp case, "even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually-obligated services exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter." Thus, by overruling one Supreme Court decision (Monsanto) and eviscerating two others (Colgate and Sylvania), S. 865 allows a jury to transform perfectly or most probably lawful conduct into a *per se* unlawful conspiracy to fix resale prices.

This result is not avoided by the proviso in S. 865 that precludes the jury from considering the alleged "concerted action" if it is forced to rely on "inferences which are implausible." As discussed above, the Court already has determined that dealer terminations arising out of disputes over exclusive territories or even service requirements could be viewed as motivated by a desire to suppress price competition. Thus, even terminations based on the most legitimate reasons would be subject to a full-blown antitrust trial. Dealer terminations that rely upon nonprice factors are pro-competitive and should not be deterred by threats of an antitrust challenge.

This reading of S. 865 is reinforced by the fact that the proposed legislation also overrules the Supreme Court's Sharp decision. S. 865 apparently makes it per se unlawful for a manufacturer and a dealer to agree to terminate a discounter for any reason, including failure to provide customer service (even if there is no further agreement setting prices or price levels.) Since, as Sharp pointed out, "price cutting and service cutting often go hand in hand," S. 865 further compounds the risk that lawful conduct will be condemned as vertical price fixing.

Thus, the most innocent of suppliers accused of vertical price fixing under S. 865 will rarely be able to demonstrate prior to trial that "inferences" of concerted action to fix resale prices can reasonably be "implausible"--at least if the supplier's files contain a single uninvited and unwanted dealer complaint about competition from another dealer facing termination for almost any reason. Moreover, under S. 865, any supplier who relies upon Colgate to announce prices in advance and then refuses to deal with those who fail to comply would be committing an act of legal suicide. In short, S. 865 works a radical change in the law at an enormous potential cost to thousands of suppliers--most of whom don't attempt to control resale prices at all.

Furthermore, where multiple causes for termination are in dispute, S. 865 renders a defendant's chances of successfully seeking summary judgment even more remote. The language of S. 865 invites factual disputes over whether a given dealer communication was "an express or implied request or demand...to curtail or eliminate price competition" or whether the communication was "the major contributing cause" of termination. This sort of factual dispute will, of course, often operate to defeat summary judgment.

These results should demonstrate why the Supreme Court, in deciding Monsanto, was concerned about blurring the distinction made in Sylvania between per se unlawful vertical price fixing and other nonprice restraints. By overruling Monsanto, S. 865 invites presenting nonprice vertical restraints to the jury as per se unlawful price fixing. By overriding Monsanto and Sharp, the legislation, in turn, absolutely guts the Sylvania and Colgate cases.

S. 865's further proviso that "(n)othing in this Act shall affect the application of the rule of reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws" may be of some help to those defendants with a proven history of vertical territorial restraints. If a supplier has such a history, it can certainly argue that a dealer termination was "because of" an established policy against extraterritorial sales, and not the result of an inferred conspiracy to fix resale prices. But what about the rest of us? Most suppliers don't fix resale prices and don't have exclusive territories either. After all, exclusive territories were per se unlawful from 1967, when the Schwinn case was decided, until 1977, when Schwinn was overturned by Sylvania. Many who had exclusive territories abandoned them during the decade they were legally vulnerable.

Furthermore, Sylvania makes all nonprice vertical restraints subject to the "rule of reason," not just territorial restraints. That being the case, why does this section of S. 865 single out just territorial restraints for future "rule of reason" treatment? The effect if not the intent of the section seems to be that those suppliers who don't have exclusive territories will find it more difficult to demonstrate that a dealer termination was not "because of" an inferred agreement to curtail price competition than those with a long history of territorial restraints.

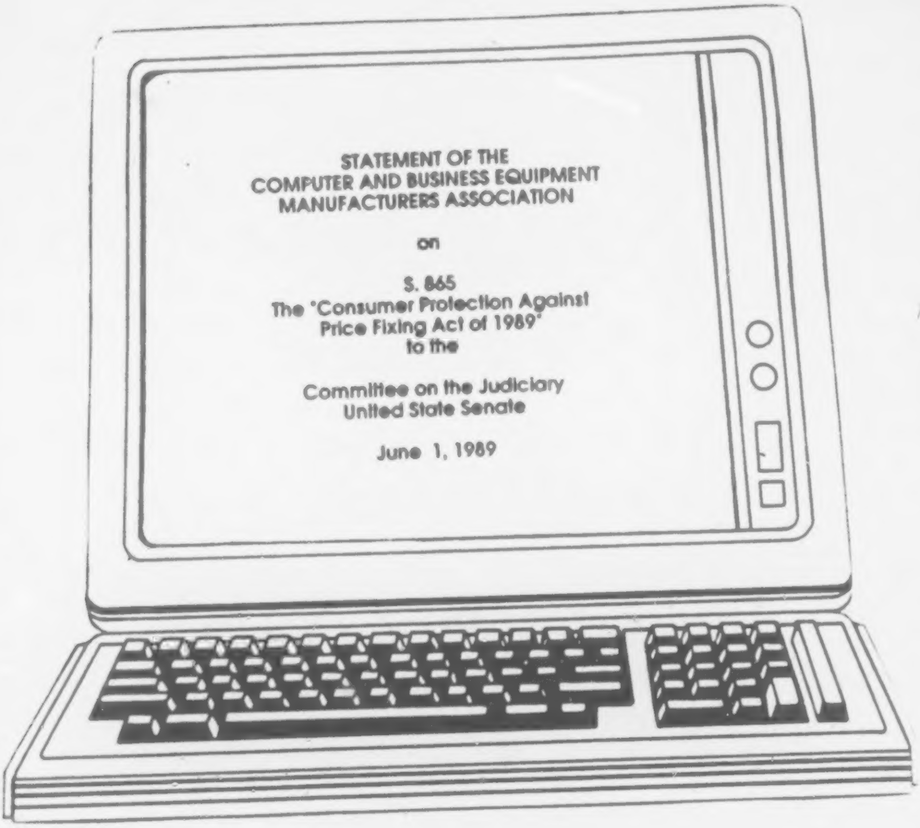
Indeed, the whole concept of subjecting suppliers to automatic jury trials for per se unlawful price fixing based upon whether their dealers elect to write and how they elect to phrase a complaint about another dealer facing termination is more than a trifle unfair to suppliers. This sort of potential per se liability by virtue of opening your mail turns dealer termination litigation into a game of chance. If the supplier opens its mail and finds a dealer complaint that might be construed as a communication about price competition by another dealer facing termination, the supplier must either abandon the termination, however lawful, or face the expense and risk of a trial for per se unlawful price fixing.

Moreover, S. 865 raises important constitutional issues. For example, the Supreme Court has already ruled that it is neither reasonable, nor even plausible to permit per se unlawful vertical price fixing agreements to be inferred from termination of a discounter, following or "in response to" complaints from rival dealers about price competition. See Monsanto, supra, 465 U.S. at 763-764; Matsushita, 475 U.S. at 588, 593-594. As indicated above, S. 865 mandates an inference of per se unlawful vertical price fixing, based upon the same ambiguous or lawful conduct rejected as a reasonable or plausible basis by the Court. Of course, due process prohibits the imposition of civil or criminal liability based upon an inference of unlawful conduct, unless there is a "rational connection" between the facts proved and the ultimate fact of illegality to be inferred. In the Court's words, "[W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing procedure of courts." See, e.g., Leary v. United States, 395 U.S. 6, 33-34 (1968). Constitutional arguments are better left to the courts, but the Congress should at least be aware that S. 865 is vulnerable to such a challenge.

While it is, of course, necessary to discuss the legal ramifications of S. 865, it is also important to recognize some of its practical effects in the marketplace. First and foremost, as noted above, a manufacturer will find it difficult and potentially very costly to terminate dealers for legitimate nonprice reasons. Second, S. 865 encourages a rise in vertical integration. A manufacturer that eliminates independent dealers and relies on wholly-owned retail outlets is protected from unfounded allegations of inferred conspiracies to fix resale prices. Thus, contrary to the goals of the bill's proponents, the long-term effect of S. 865 could well be a decrease in intrabrand competition. Third, S. 865 will chill communication between manufacturers and their distributors or dealers, essential to the efficient distribution of products and services. Fourth, ensuring that manufacturers can continue to offer a wide range of service and other options to the consumer, which while having price implications, is pro-competitive. Interbrand competition, which is company against company and model against model, is, after all, what provides consumers their greatest benefit of a free market economy. Factors such as quality (whether it be type of metal or fabric), provision of servicing, or even an understanding between "deluxe" versus "standard" features contribute to a consumer's ultimate purchase along with relative prices. The ultimate loser in any of these scenarios is, of course, the consumer, who will ultimately bear the cost in the form of inefficient distribution, higher prices, diminished service and/or decreased choice.

Finally, the effects on small manufacturers would be especially devastating. These are the very firms that rely most heavily on distributors for marketing, promotion, and service. If a small manufacturer is informed by one dealer that a rival is shirking its obligations to service the product, then the small manufacturer would not have assets even to defend itself against a threatened treble-damages trial and would be forced to retain the nonperforming dealer. This would hurt the quality distributors at least as much as the small manufacturer, since the reputation of the product is at stake.

The NAM hopes that the members of the Committee will recognize the very serious legal and business problems that enactment of S. 865 would create. The issue is not discount versus full price retailers--the trend toward discounting at the retail level bears this out. Rather, the issue is about dramatic and substantive changes to the antitrust laws caused by overruling Monsanto and Sharp, and thereby undermining the well-established legal principles announced in Sylvania and Colgate, upon which hundreds of lower court decisions are based. It is this profound change in the law upon which the Committee's deliberations should center.



STATEMENT OF THE
COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

on

S. 865
The "Consumer Protection Against
Price Fixing Act of 1989"
to the

Committee on the Judiciary
United State Senate

June 1, 1989

CBEMA

Computer and Business Equipment Manufacturers Association
311 First Street, N.W. • Washington, D.C. 20001 • 202-737-8888

June 1, 1989

STATEMENT OF THE COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION ON S.865, THE CONSUMER PROTECTION AGAINST PRICE FIXING ACT OF 1989

Before the

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

The Computer & Business Equipment Manufacturers Association (CBEMA) and its members appreciate the opportunity to contribute to your consideration of S.865, the Consumer Protection Against Price Fixing Act of 1989, which deals with antitrust suits alleging that suppliers have attempted to fix resale prices. We have followed the development of this legislation over the past several years, because maintaining first-rate distribution and retail outlets for our complex and rapidly changing products is essential to our individual companies and for their customers. In the 100th Congress we worked closely with this Committee and its excellent staff on this issue and we appreciate this opportunity to contribute again.

We hope that the Committee will review very carefully the major new provisions that have been added to the bill this year, before deciding to move it forward. These changes include vague, unprecedented, and sweeping language that could fall with special severity on our industry, its distribution and retail networks, and its customers. These provisions could spark an explosion of litigation and otherwise greatly complicate the task of shaping distribution systems for high technology products and services that keep pace with innovation and with increasingly sophisticated customer requirements.

We also suggest that reexamination is appropriate for certain key provisions of the bill reported and passed by the Committee last year. While well-intentioned, these provisions could also introduce unnecessary litigation, uncertainty, costs, and rigidity into high technology distribution.

In offering these suggestions, we want to stress that CBEMA is concerned about this legislation not for ideological or political reasons, but for purely practical reasons. We are not submitting this statement because our members are disproportionately frequent targets of the type of antitrust claims covered by S.865, or because we have especially fractious relationships with our retail and distribution outlets.

On the contrary, the reverse is the case, as indicated by the presence on your June 1 witness list of Alan P. Hald, a computer products retailer and Chairman of ABCD: The Microcomputer Industry Association. As Mr. Hald will agree, all segments of our industry, manufacturers and resellers alike, strive to function as a partnership. In many cases, resellers add substantial value to the manufacturer's product before selling it to end users, by altering the product in a way designed to meet users' needs, or by combining the product with other products. Even where resellers do not add value to the product, they commonly provide extensive pre-sale and post-sale support to end users. Resellers help end users to assess their needs, assess and explain how the manufacturer's products can meet those needs, help to train the end user to use the product, and otherwise support the customer's use of the product after the sale. Indeed, the fact that resellers in our industry add value to the product and provide such extensive services to end users is a significant factor that distinguishes the distribution of our products from other distribution arrangements, especially discount retail arrangements. It is essential that manufacturers and resellers in our industry work together to provide adequate service and maintain high quality and efficient distribution systems, for the good of our customers. None of us believe that this legislation as drafted will be helpful in that regard.

CBEMA's members include most of the leading United States providers of computers and other information technology products to businesses, governments, schools, and homes here and around the world. A membership list is appended to this statement as Exhibit 1. Our members are also leaders in many related high technology office equipment fields and in software and computer-related services as well. In 1988 our industry employed approximately 1.2 million men and women in the United States, generated $27.7 billion in exports, and contributed $230 billion to the gross national product. Information systems technology is one manufacturing sector in which the United States retains a position of world leadership -- though worldwide competition grows more intense every year. We believe that our members' capacity to continue developing, improving, producing, and distributing information technology products and services disperses innovation and efficiency throughout the economy, and thus contributes to the international competitiveness of all U.S. industries, in addition to our own.

I. Major Differences Between S.865 And Its Predecessor Bill.

As we view this bill in comparison to S.430 from the 100th Congress, we see three major substantive changes:

1. The first and most important change is the final sentence in Section 3 of the bill [new Section 8(b) of the Sherman Act, as amended] to the effect that an agreement between a supplier and a reseller to terminate or refuse to supply another reseller is a per se violation -- that is, a violation without proof of actual anticompetitive harm to consumers -- "whether or not a specific [resale] price or price level is agreed on", if the termination or refusal to supply is "because of [the terminated reseller's] pricing policies." This language is intended to overrule the May 1988 decision of the U.S. Supreme Court in Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515 (1988), generally referred to as the Sharp case.

   With respect, Mr. Chairman, we suggest that this language represents an overreaction to the Supreme Court's decision, which we believe to be narrow in scope and no more than a common sense application of basic antitrust principles to the facts of that case. Moreover, the language of this new sentence in S.865 goes far beyond what is needed to qualify or correct Sharp, could undermine other major long-standing and well accepted, Supreme Court precedents, and will generate substantial unintended market-place problems. We will discuss these concerns in more detail below.

2. The second change in S.865 is a new Section 4, which states that "Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of such Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy."

   This new section apparently reflects a recognition that, as written, new Section 8(a)(1)(B) of the Sherman Act created by Section 3 of the bill could readily undermine the fundamental principle that Sections 1 and 3 of the Sherman Act forbid only conspiracies, not individual unilateral actions. Section 8(a)(1)(B) provides that if a supplier receives a complaint by one reseller about another, and then subsequently terminates or refuses to supply the second reseller, the supplier risks treble damage liability dependent on whether a jury might consider the complaint the "major contributing cause" of the subsequent action. As a practical matter, that will often be a big risk, even in many cases where the decision would be completely independent on the supplier's part.

This new Section 4 seems to be intended to ameliorate the erosion of the conspiracy requirement under new Sherman Act §8(a)(1)(B). This is a very worthwhile objective, but the remedy is not sufficient to offset the above language. A more effective approach is required.

3. The third change is Section 5, which provides that "Nothing in this Act shall affect the application of the rule of reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws." (Emphasis added.) This language is puzzling and could be construed to undermine the Supreme Court's landmark decision in Continental T.V. Inc. v. GTE Sylvania, 433 U.S. 36 (1977), in which the Court held that all nonprice vertical restraints were to be evaluated under the rule of reason standard, not treated as *per se* violations. We are confident that no member of this Subcommittee wants to throw a cloud over the validity of supplier-reseller arrangements concerning issues other than resale prices. But unfortunately, by singling out certain nonprice arrangements, the bill creates an implication that other nonprice arrangements should no longer receive rule of reason treatment.

   This would be a truly catastrophic result. To avoid it, the Subcommittee needs either to drop Subsection 5, or revise it to state that the Act does not affect the application of the rule-of-reason standard to all nonprice restraints.

II. S.865 Will Impose Particular Costs and Dislocation on the Distribution of Complex Products and Services Such as Computers and Computer-Based Information Technology Systems.

As noted above, new Sherman Act §8(b) created by the bill of S.865 contains a new sentence providing that an agreement between a supplier and reseller to terminate or refuse to supply a second reseller is a *per se* Sherman Act violation, even if the agreement involves no demonstrated attempt to set resale prices or price levels, as long as the decision is made "because of [the reseller's] pricing policies." Looking at this language from a practical standpoint, the major problem -- and it is a big problem -- is that virtually every decision to shift distribution responsibilities for a product or service from one outlet to another or from one type of outlet to another type involves issues that bear at least some relationship to "pricing policies."

The impact of this new language will fall with special severity on the high technology sector. This is true because of three basic features of the distribution system for this sector:

1st: In order to make effective use of many of the products and services sold by our members, customers often need extensive purchasing assistance, system design and engineering, maintenance and updating, and other elements in addition to the hardware or software itself. This means that manufacturers have a strong interest in assuring that retail outlets have the capacity -- and hence the resources -- to provide ultimate consumers with the support necessary to keep the customers satisfied with product performance.

2nd: Information technology products are distributed through complex networks with "channels" involving many different types of distributors and retailers -- everything from individual stores to regional or national chains to "value added resellers" and "systems integrators" who package and re-engineer multiple components into systems tailored to particular customers or types of customers. A sense of the complexity of these distribution networks can be gained from Exhibit 2, which portrays the distribution of one major product -- personal computers -- manufactured by our industry.

3rd: Innovation occurs rapidly and the average life cycle for a new product is quite short. The resulting competitive pressures generate frequent and massive shifts among different types of resellers and distribution strategies. For example, since 1985, direct manufacturer sales to ultimate end-users in the personal computer industry have dropped as a percentage of all sales, sales through retail resellers (including individual stores, franchise groups, and regional and national chains under the control of a single owner) have grown, the total number of computer retailers has shrunk, and the proportion of business controlled by specialty resellers (software only, advanced technology models only, etc.) has mushroomed.

The distribution sector for high technology products is fiercely competitive. Suppliers, distributors, and retail outlets are constantly seeking new ways to meet their customers' needs and gain an edge on their competitors. All are continually starting new relationships, modifying and sometimes terminating existing relationships. This is of course highly beneficial to the consumer and it accentuates pressures for continual innovation, both in the products and in the ways in which they are marketed.

But the new provisions of S.865 will damage this process. They will throw a damper on innovation. They will add to the commercial risks and uncertainties of change big new unpredictable legal risks. This is because decisions to keep or change distribution relationships in this sector frequently turn on a trade-off between "value-added" (such as service, engineering, training, maintenance, etc.) on the one hand, and cost on the other.

It doesn't take years of legal training to see that in such an environment the new language in Section 8(b) will generate multiple temptations to reverse market-place decisions in the courts. The bill removes the requirement that to be per se illegal, an agreement to terminate or refuse to supply a retailer be pursuant to a shared objective of fixing resale prices. Hence, in each case, the courts will be faced with an insoluble question -- was a particular decision motivated by concern about a reseller's "pricing policies," or about service quality or technical know-how? In reality, the two are opposite sides of the same coin. So millions or tens of millions of dollars in potential treble damage exposure will turn on semantics.

These results will not benefit any segment, including consumers, of the high technology sector, and we believe that the same conclusion is appropriate for the rest of the economy as well. Our free and flexible distribution system is a major national asset. Introducing unnecessary legal rigidities and barriers to change into that system should only be done when some strong showing is made that such constraints are needed. We are not aware that any such showing has been made here.

III. The New Sherman Act §8(b) Is An Overreaction to Sharp.

While the Supreme Court's Sharp decision has been portrayed as imposing an unjust burden on plaintiffs in dealer termination cases, we see it as a relatively narrow, if nevertheless significant attempt by the Court to affirm a core element of antitrust liability. All the Court determined in Sharp was that a plaintiff cannot make out a per se violation against his former supplier and a competing dealer without at least some sort of proof of a desire to fix resale prices. This after all is what the antitrust laws are about. They are not designed to mediate the equities and legal rights of individual disputes; this is the province of contract law. Indeed, many if not most dealer termination cases are in reality contract cases with secondary antitrust claims added to the complaint.

Moreover, it should be borne in mind that Sharp will not put plaintiffs without proof of a resale price fixing conspiracy out of court, even on their antitrust claim. They will just not have a per se case. Thus they will have to prove that their termination produced actual market-place anticompetitive harm -- such as an artificial increase in price-levels or a restriction of supply. In fact, after the Court's decision, the Sharp case was settled; so it would appear that the decision hardly eliminated all value from the plaintiff's case even in that situation.

In any event, the formulation inserted into proposed Sherman Act §8(b) appears to us to do a lot more than simply overrule Sharp. The language will surely undermine many other important and long-standing precedents.

We are particularly concerned about the potential impact of this bill on GTE Sylvania, which held that non-price vertical restraints are judged under the rule of reason. Section 8(b), because of its overly broad scope, threatens to effectively reverse this rule and apply per se analysis to nearly all terminations or refusals to supply discounters. Assume, as in GTE, a supplier sought to implement a franchising plan which limited franchisees to sell products only in specified locations. Assume further that a discounter applied for a franchise for a particular location. If the supplier and the existing franchisers agreed to deny the application because the area was already adequately served, presumably the rule of reason would apply. However, if the agreement not to supply is based on the discounter's unclean showrooms, untrained salespeople, reputation for poor warranty service, and the effect of the discounter's low prices on the ability of competing full-service franchisees to sustain their full array of sales support, the per se rule may apply under new Section 8(b). The jury would not have the opportunity to consider whether the net effect on competition was unreasonable.

Thus, section 8(b) will have the real world effect of creating obstacles to efficiency-producing reorganizations of distribution systems. The facts of the GTE case show that GTE increased its sales dramatically by phasing out the use of wholesale distributors and selling products directly to a small and more select group of franchised dealers. However, if such a change involved dealing exclusively with full-service outlets, the broad and ambiguous standard for per se liability under Section 8(b) coupled with the threat of treble damages could deter the clearly efficient reorganization.

IV. The Weak Evidentiary Standard of new Sherman Act §8(a)(1)(B) Will Undermine The Fundamental Principle That The Antitrust Laws Condemn Only Conspiracies To Restrain Trade, Not Unilateral Conduct.

As noted above, the S.865 contains a new Section 4 that reiterates the principle that the Sherman Act invalidates only conduct determined to be an illegal "contract, combination, or conspiracy," as distinguished from unilateral conduct by an individual or a firm. The drafters evidently considered this provision necessary in order to offset a possible impression yielded by Section 3 of the bill. The drafters were correct in identifying this problem, but Section 4 is not an adequate solution.

As new Sherman Act §8(a)(1)(B) now stands, a supplier has only the undefined and inherently imprecise concept of "major contributing cause" to protect him from treble damage liability for decisions that are in fact independent and unilateral. Moreover, the risk of injustice -- and of punishing lawful and pro-competitive conduct -- is greatly compounded in the new bill by the amendment to Section 8(b) designed to overrule Sharp. As a result of this change, the two subsections combined mean that:

> Treble damage liability becomes a serious risk whenever entirely unsolicited complaint letters concerning a marginal reseller have been sent to a supplier prior to the supplier's decision to terminate or not to resupply, and either the complaint letters or the supplier's own basis for acting could be construed to have some relationship to resale "pricing policies" -- without any further proof either of intent to fix resale prices in the market or of actual anticompetitive harm to consumers.

The basic problem is that causation -- however defined or qualified -- is not the same as agreement. A dealer's complaint may trigger an inquiry by a supplier that ultimately leads to action to discipline or terminate the subject of the complaint. While the supplier's reasons for termination may be his own, nevertheless the complaint letter is a "cause," and it will be difficult to be sure that it will not be construed to be the "major contributing cause" under all the often ambiguous circumstances of a particular case. Given the constant flow of complaints received by manufacturers and the minimal evidentiary requirements of Section 8(a)(1)(B), all dealer terminations, including perfectly legitimate unilateral decisions, would carry a substantial risk of costly antitrust litigation.

It should be stressed that the potential in this section of the bill for chilling legitimate, pro-consumer conduct will not be eliminated by the fact that in S.865, the equivalent formulation in S.430 as reported by the Committee in the 100th Congress "a major contributing cause" has been changed to "the major contributing cause." It seems unlikely that the courts will construe this phrase to be equivalent to "the major cause." On the contrary, it would seem probable that a contributing cause would be interpreted to be something less than the "principal" or major cause; hence, it would be anyone's guess what a jury would consider the major contributing cause for a typical complex business decision.

Such results are not what the bill's sponsors intend, we understand. But the new Section 4 of the bill is not a reliable way to avoid them.

V. New Section 5 Could Undermine The Established Principle That "Nonprice" Vertical Restraints Are Subject To the Rule of Reason, Not the Per Se Standard.

As noted above, the provisions of another section added to the legislation this year could sweep away other fundamental principles of antitrust doctrine that the sponsor's presumably does not intend to alter. That section states that the bill is not intended to affect rule of reason treatment for certain types of "nonprice" vertical restraints -- "vertical location clauses" and "vertical territorial restraints." Thus, this language raises an obvious implication that the bill does not intend to preserve rule of reason treatment for other types of vertical restraints. This risk is compounded by the fact that Section 3 would overrule Sharp, which held that an agreement to terminate a discounter, without more, should be considered a "nonprice" restraint. Hence, it will be forcefully argued that S.865 overturns, not only Sharp, but also GTE Sylvania as well and extends per se treatment to all nonprice restraints not specifically mentioned in Section 5.

To avoid this ext~~ra~~ordinary -- and we presume unintended -- result; the Subcommittee should amend the bill either by eliminating Subsection 5 or by expressly rewording it to coincide with GTE Sylvania's application of rule of reason treatment to all nonprice vertical restraints.

Conclusion

In conclusion, we oppose this legislation as it is currently drafted. We stand ready to provide such further assistance as the Subcommittee finds useful.

NAM

National Association
of Manufacturers

JAMES P. CARTY
Vice President
Government Regulation, Competition
& Small Manufacturing

June 26, 1989

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
c/o 308 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Association of Manufacturers would like to submit the attached statement for the June 1, 1989 hearing record on S. 865, The Consumer Protection Against Price-Fixing Act.

To summarize, the NAM believes that S. 865 is both unnecessary and unwise legislation: unnecessary because there has been no evidence to indicate that plaintiffs in resale price maintenance cases have suffered a disproportionate number of adverse summary judgments since the Supreme Court ruling in Monsanto Company v. Spray-Rite Service Corporation, compared to plaintiffs in other torts; unwise because it will hinder the ability of manufacturers to enforce nonprice contractual obligations consistent with both the Colgate and GTE Sylvania doctrines.

Furthermore, the record fails to demonstrate that the growth of the discount segment of retailing has been hindered under current law. On the contrary, discounting is flourishing and is, in fact, the dominant trend in retailing today.

Thank you for this opportunity to express our views on S. 865 for the record. We have taken the liberty of sharing our statement with the other members of the Committee on the Judiciary.

Sincerely,

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II

101st CONGRESS
1st Session

S. 865

To amend the Sherman Act regarding retail competition.

IN THE SENATE OF THE UNITED STATES

April 19 (legislative day, January 3), 1989

Mr. Metzenbaum (for himself, Mr. Rudman, Mr. Simon, Mr. Wilson, Mr. Bradley, Mr. Sasser, Mr. Cranston, Mr. Boschwitz, Mr. Gorton, Mr. Exon, Mr. Lautenberg, Mr. Kerry, Mr. Pell, Mr. Kennedy, Mr. Levin, Mr. Moynihan, Mr. Bingaman, Mr. Adams, Mr. Lieberman, and Mr. Dodd) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Sherman Act regarding retail competition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Consumer Protection Against Price-Fixing Act of 1989".

Sec. 2. The Congress finds that—

(1) consumer welfare is greatly enhanced by an ability to purchase goods and services at lower prices as a result of vigorous price competition;

(2) vertical price restraints generally have an adverse impact on competition that results in higher consumer prices;

(3) recent court decisions have so narrowly construed the laws against vertical price restraints that consumer welfare has been put in jeopardy; and

(4) it is necessary to enact legislation that protects the interests of consumers in vigorous price competition while recognizing the needs of manufacturers and others to maintain reasonable service, quality, and safety standards.

SEC. 3. The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"SEC. 8. (a)(1)(A) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if pursuant to the Federal Rules of Civil Procedure the court finds that there is sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale entered into a contract, combination, or conspiracy with a competitor of such claimant to curtail or eliminate price competition by such claimant in the resale of such good or service, then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section.

"(B) For purposes of paragraph (1), the court shall find the existence of 'sufficient evidence' that a person who sells a good or service entered into a contract, combination, or conspiracy if the claimant presents sufficient evidence that such person—

"(i) received from a competitor of the claimant an express or implied request or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by the claimant in the resale of such good or service, and

"(ii) because of such request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to supply to the claimant some or all of such goods or services requested by the claimant: *Provided*, That a termination or refusal to supply is made 'because of such request, demand, or threat' only if such request, demand or threat is the major contributing cause of such termination or refusal to supply.

"(2) The court shall not permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section if the court determines that the trier of fact could only find that such person and such competitor engaged in concerted action by making inferences which are implausible.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section, except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service is an agreement to set, change, or maintain the maximum resale price of a good or service. An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of this section, whether or not a specific price or price level is agreed upon.".

SEC. 4. Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of that Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy.

SEC. 5. Nothing in this Act shall affect the application of the rule of reason standard to vertical location clauses or vertical territorial restraints under the antitrust laws.

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